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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 59

MABEL G. REINECKE, COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF ILLINOIS, PETITIONER

vs.

EUDORA HULL SPALDING

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 30, 1929
CERTIORARI GRANTED APRIL 29, 1929

(34108)

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1 [Caption omitted.]

2 In United States District Court, Northern District of Illinois, Eastern Division

EUDORA HULL SPALDING, PLAINTIFF

vs.

MABEL G. REINECKE, COLLECTOR OF INTERNAL REVENUE FOR THE FIRST District of Illinois, defendant

No. 35700

Declaration

Filed June 4, 1926

Eudora Hull Spalding, plaintiff, by John M. Zane, Henry A. Gardner, Alfred T. Carton, and Urban A. Lavery, her attorneys, complains of Mabel G. Reinecke, collector of internal revenue for the first district of Illinois, defendant, of a plea of trespass on the case upon promises, and shows to the court that this is a suit of a civil nature at common law arising under the laws of the United States providing for internal revenue.

First count

1. For that whereas plaintiff is a citizen of the United States and a resident of the city of Chicago, county of Cook, and State of Illinois, and the defendant at the times more specifiaclly hereinafter mentioned was and now is a resident and an inhabitant of the said city of Chicago, and of the northern district of Illinois, and of the eastern division thereof, and was and still is the duly appointed and qualified United States collector of internal revenue for the first district of Illinois, and the plaintiff alleges:

3 2. That plaintiff was the owner on March 1, 1913, of an undivided one-sixth interest in certain iron ore bearing lands situated in the county of St. Louis, State of Minnesota, more particularly described as follows:

Tract No. 1. Lots No. 3 and 4 in section 6, township 57 north of range 20 west of the fourth principal meridian, being the same as the north ½ of the northwest ¼ of said section 6.

Tract No. 2. The south ½ of the northeast ¼ and the northeast ¼ of the southeast ¼ of section 2, township 57 north, range 21 west, of the fourth principal meridian.

Tract No. 3. The northwest ¼ of the southwest ¼ of section 1 and the southeast ¼ of the southeast ¼ of section 2, township 57 north, range 21 west of the fourth principal meridian.

Tract No. 4. Lot No. 2 of section 31 in township 58 north of range 17 west of the fourth principal meridian.

Tract No. 5. Lot No. 5 and the southeast ¼ of the northwest ¼ of section 6 in township 57 north, range 20 west of the fourth principal meridian.

Tract No. 6. The east ½ of the southeast ¼ of section 11 and the southeast ¼ of the northwest ¼ and the west ½ of the southwest ¼ of section 12, all in township 57 north, range 21 west of the fourth principal meridian, and the northwest ¼ of section 7, township 57 north, range 20 west of the fourth principal meridian.

Tract No. 7. The northeast ¼ of the northeast ¼ of section 7, township 57 north, range 17 west of the fourth principal meridian.

Tract No. 8. The northeast ¼ of the northeast ¼ of section 11, and the north ½ of the northwest ¼ of section 12, township 57 north, range 21 west of the fourth principal meridian.

Tract No. 9. The north ½ of the northeast ¼ and the southwest ¼ of the northeast ¼ of section 6, township 57 north, range 20 west of the fourth principal meridian.

Tract No. 10. The southwest ¼ of the southwest ¼ known as lot No. 3 of section 22, township 58 north, range 20 west of the fourth principal meridian.

Tract No. 11. The northwest ¼ of the southeast ¼ and the northeast ¼ of the southwest ¼ of section 6, township 57 north, range 20 west of the fourth principal meridian.

4 Tract No. 12. The southeast ¼ of the northeast ¼ of section 11 and the southwest ¼ of the northwest ¼ of section 12, township 57 north, range 21 west of the fourth principal meridian.

Tract No. 13. The southwest ¼ of the southeast ¼ and the southeast ¼ of the southwest ¼ of section 6, township 57 north, range 20 west of the fourth principal meridian.

That said tracts of land were on March 1, 1913, leased to various lessees, as follows:

Tracts Nos. 1, 2, 3, 4, and 5 for a term of forty-five (45) years from and after January 1, 1905, for the purposes of exploring for and mining, taking out, and removing and shipping therefrom the merchantable iron ore therein upon a royalty at the rate of twenty-five cents (25c.) per cross ton of two thousand two hundred and forty (2,240) pounds, due and payable on the 20th days of April, July, October, and January in each calendar year, with a guaranteed minimum yearly output of six hundred thousand (600,000) gross tons for the term. Such minimum royalty was payable quarterly whether or not sufficient ore was extracted to actually amount to same at the prescribed royalty rate, but prepaid royalties might be credited against ore subsequently extracted in excess of the minimum. Royalties in excess of the minimum paid on ore extracted during any quarter might be applied on the minimum royalty for any subsequent quarter in the same year. The lessee agreed to pay all taxes and assessments and to keep the premises free and clear of all encum-

brances arising from labor or mechanics' liens or claims, all covenants in the lease to run with the land. All of said leases covering the other tracts were substantially similar, except as follows:

The lease on tract No. 6 was for fifty (50) years from January 1, 1905, and the guaranteed minimum was three hundred thousand (300,000) gross tons for the last five years.

The lease on tract No. 7 was for fifty (50) years from January 1, 1902, and provided for a minimum annual royalty of fifty thousand (50,000) tons.

The lease on tract No. 8 was for fifty (50) years from January 1, 1902, and provided for a minimum annual royalty of one hundred thousand (100,000) tons.

The lease on tract No. 9 was for fifty (50) years from July 1, 1902, and provided for a minimum annual royalty of one hundred and fifty thousand (150,000) tons.

5 The lease on tract No. 10 was for fifty (50) years from January 1, 1903, and provided for a minimum annual royalty of fifty thousand (50,000) tons.

The lease on tract No. 11 was for fifty (50) years from October 1, 1902, and provided for a minimum annual royalty of one hundred thousand (100,000) tons.

The lease on tract No. 12 was for fifty (50) years from January 1, 1903, and provided for a minimum annual royalty of one hundred thousand (100,000) tons, and the lease on tract No. 13 was for twenty-five (25) years from October 1, 1903, and provided for a minimum annual royalty of fifty thousand (50,000) tons.

3. That during the calendar year 1917 plaintiff was in receipt of moneys under and by the terms of said leases for ore removed and to be removed from said lands amounting to $260,070.75.

4. That the plaintiff, in order to comply with the provisions of the revenue acts of 1916 and 1917 in due course filed her income tax return for the calendar year 1917. That the plaintiff in said tax return showed the sum of $30,158.75 as net income. In arriving at such net income plaintiff deducted from her gross income the following items among others, namely:

Donations	$4,523.81
Depletion of mines	260,670.76

leaving the amount of net income as above set out. Said return showed the sum of $598.85 due as income tax from plaintiff which said plaintiff promptly paid.

5. That thereafter the Commissioner of Internal Revenue (hereinafter called the "commissioner"), purporting the act in reliance upon the provisions of said revenue acts of 1916 and 1917, through the medium of a letter dated July 13, 1922, written on his behalf by E. E. Alden, internal revenue agent, stated that he was about to assess the plaintiff an additional income tax for the year 1917 based as is shown by said letter upon the conclusion that the amount of $4,523.81 deducted by plaintiff for donations in computing her said income and the amount of $260,670.76 deducted by plaintiff for

depletion were not correct, but that the sum of $29,143.66 was deductible for donations and the sum of $96,870.74 was deductible for depletion.

Said commissioner allowed a depletion of $.0886243 per ton of ore for all ore removed from said ore bearing properties of said
6 plaintiff and for each 25¢ of minimum royalty paid under and by the terms of said leases, such depletion per ton and the total depletion for the year being arrived at as follows:

Ore reserve March 1, 1913, according to the Minnesota Tax Commission as shown on questionnaire of the *of the* Royal Mineral Association——tons	191,417,150
Less advance royalty payment by lessees, prior to March 1, 1913, on——tons	3,034,258
Net tonnage as of March 1, 1913——tons	188,382,892
Plaintiff's interest, one-sixth——tons	31,397,148.7
Total average yearly extraction, 1913 to 1918, inclusive	4,770,000
Maximum life of mine allowed——years	40
Interest rate allowed	6%
Royalty rate per ton	25¢
Capital returnable in 40 years	$7,849,287.18
Present worth of interest March 1, 1913	2,782,551.64
Unit cost per ton, March 1, 1913	$0.0886243
Depletion in 1917——tons	1,040,289.4
At .0886243 per ton	$92,194.92

6. That thereafter the commissioner through the medium of a letter written on his behalf by J. G. Bright, deputy commissioner, stated that he was about to assess against plaintiff an amended income tax for the calendar year 1917 based, as is shown by said letter, upon the conclusion that the depletion to be allowed plaintiff should be increased over the amount stated in the letter of said Alden to $99,561.20, and that plaintiff should be allowed expenses of mining ore of $4,675.84, and that plaintiff should be allowed a loss incurred on a farm owned by her amounting to $2,327.60. Said letter further stated that a deduction amounting to $27,689.15 for contributions should be allowed said plaintiff and that a total tax of $33,407.99 would be assessed against plaintiff. Pursuant to said letter the commissioner assessed the amount of $33,407.99 tax. Thereafter Mabel G. Reinecke, to wit, on September 19, 1924, who was then acting as collector of internal revenue for the first district of Illinois under the provisions of the revenue acts of 1916 and 1917, served on plaintiff a written notice and demand for tax, thereby demanding the payment by plaintiff at her office in Chicago, Illinois, on or before September 29, 1924, of an additional
7 income tax for the calendar year 1917, which was the additional tax assessed as aforesaid and was in the amount of $32,809.14 and interest amounting to $6,671.08. That said notice and demand stated that failure to pay or or before September 29, 1924, the sum demanded as aforesaid would cause a 5% penalty to accrue with interest at 1% per month from date due until paid and that failure to pay the sum demanded would cause seizure and sale of the property of the plaintiff to be made.

7. That on, to with, September 29, 1914, solely to avoid the threatened imposition of said penalty and interest for failure to pay and to avoid persecution and seizure and sale of her property and under duress, compulsion and coercion, the plaintiff paid to the defendant the sum of $39,480.22 tax and interest so assessed against her and demanded from her as aforesaid as additional tax for the calendar year 1917 and interest thereon; that said payment was made under protest and at the same time plaintiff protested in writing that the assessment of said tax and interest and payment of said tax and interest was unlawful and deprived the plaintiff of rights secured to her by the Constitution of the United States and the revenue acts of the United States and the rules and regulations of the Treasury Department and the Bureau of Internal Revenue.

8. The plaintiff denies the conclusion of the commissioner in said assessment letter of J. G. Bright, deputy commissioner, that the sum of $99,561.20 is the correct amount of depletion to be deducted from the gross income from the said ore mines, and claims the right to deduct from said gross income depletion of $214,630.31, being $115,069.11 more than the amount allowed by the commissioner as depletion by reason of the allowance of said additional depletion as claimed by plaintiff she claims that the deduction for charitable contributions allowed by the commissioner is excessive and should be $10,429.20 instead of $27,689.15, and that the net income of the said plaintiff subject to tax rightfully amounts to $59,098.79 instead of $156,907.57 as fixed by the commissioner.

9. That after payment by the plaintiff to the defendant of $39,480.22 additional tax and interest as aforesaid on, to wit, January 20, 1926, the plaintiff made and filed with the defendant for transmission to the commissioner an application, appeal and claim, No. 843 for the refund of the sum of $36,910.29 of said additional tax and
8 interest so assessed and demanded as aforesaid, in manner and form as provided in section 3226 in the Revised Statutes of the United States, the provisions of law in that regard and the regulations of the Secretary of the Treasury in pursuance of that law. Thereafter, by letter dated May 12, 1926, the commissioner rejected said claim in full.

10. That the value or market price of said ore in the ground untouched and unextracted on March 1, 1913, and on all dates subsequent thereto, exceeded the sum of twenty-five cents per ton, so that every ton of ore paid for under said leases in the year 1917 was disposed of at a price actually less than the market price of the ore, and if then sold free of said lease, would have realized more than twenty-five cents per ton. The actual depletion of the mines by each ton or ore extracted was more than twenty-five cents when extracted.

That under the terms of the law the depletion for ore extracted or considered to be extracted was fixed at the market value of the ore in place in the mine at the time and place of extraction, but if such depletion allowance per ton exceeded the amount fixed as the royalty

per ton in the lease, the depletion allowance to the plaintiff could not exceed such royalty, but since the royalty when paid included an amount of interest on the payment considered as deferred from March 1, 1913 to the date of actual payment of royalty and the allowance of such depletion in successive years could never exceed the market value of the ore in the mine on March 1, 1913.

That each payment for ore extracted consisted of two parts, one of which was interest on the deferred payment and the other of which was the actual present worth of the payment deferred from March 1, 1913. Said actual present worth is accurately represented for each ton by that sum which put at interest on March 1, 1913, would produce at the date of payment for ore the royalty paid per ton; to put it in another way, the actual present worth of the ore extracted is accurately ascertained by taking from the royalty per ton paid, the part of the royalty, when and as paid, which represented interest on the deferred payment from March 1, 1913.

That such an allowance of depletion in successive years and in the year 1917 did not and could not exceed the market value of such ore on March 1, 1913.

That the method of calculating the depletion followed by the
9 Government taxing body assumed the average present worth of the ore extracted for all the years, as the present worth of the ore extracted in each particular year and asserted that a payment for ore made in 1917, upon which the seller had waited for payment less than four years, was made up of precisely the same amounts of principal and interest as that for ore upon which the seller had been or would be compelled to wait for from twenty to forty years; that there was precisely as much interest in a payment of twenty-five cents per ton deferred for four years as in a payment of twenty-five cents per ton deferred for forty years.

The Government arrived at the present worth as of March 1, 1913, substantially in the following manner, to wit:

The total value of the ore was found by multiplying the total tonnage as estimated by the Minnesota Tax Commission by the 25c. royalty fixed by the lease. This sum was divided into forty years. It was assumed that one such part would be received by the taxpayer in each year of the estimated life of the mine. Each sum was then discounted at the rate of 6% for the period of time which would elapse between March 1, 1913, until same would be received by the taxpayer. After deducting the discount the remaining sums were added and the resulting amount was assumed to be the present worth. Conceding that such method is a correct one, it follows that the present worth of ore extracted in any one year is definitely ascertained, and that the ore extracted in different years has a different present worth and therefore a different value to the taxpayer. On the Government's own theory, as presented above, the unit of depletion can not properly be averaged for all the years.

That the Government's calculation admits that the present worth of the ore in a particular year was the amount for which depletion should be allowed, but disregards the terms of the lease by treating the ore as sold on March 1, 1913, at the averaged present worth for all the years of the lease.

That the present worth as of March 1, 1913, of the ore can not be accurately determined under the leases until the ore is actually extracted and the date of payment therefor thereby determined.

That the Government's system of figuring the present worth for the purpose of determining depletion as fixed in the sum exacted from the plaintiff as income tax, requires assumptions, not one of which is justified, namely, first, that precisely the same amount of ore will be extracted each year; second, that the mines have an arbitrary life of the term of each lease; third, that the exact amount of ore in the mine will be extracted precisely with the expiration of the term of the lease.

That the Government's method of determining the present worth as of March 1, 1913, and from that the depletion unit requires the use of a 6% rate of discount. The taxpayer maintains that such rate of discount is unreasonably large and is not the proper reasonable and prevailing rate in such a case as is here involved, even tho it may be in the case of mines operated by the taxpayer. The reason is that the taxpayer has none of the hazards of the ordinary operating mine owner. Here the ore is worth in the market upwards of $1.00 per ton, the royalty is but 25c. per ton; it is a necessary product in the industrial life of the nation; the lessees are financially beyond question and even though they were to fall into financial difficulties these leases, being assets of great value, would under any conceivable circumstances be surrendered. Therefor such properties are comparable with the very best of non-tax exempt securities, the prevailing rate of interest on which is about five per cent.

The amount of the interest rate being determined the correct method of figuring depletion requires the determination of only one fact fully ascertained before the return of the taxpayer is made, viz, the date of payment for ore.

That if of each payment for each ton of ore extracted, the amount of such payment which represents interest on the payment as deferred and actually paid, be figured, the income of the owner will be accurately determined as that part of the twenty-five cents, which represents interest.

That for the year 1917 a correct calculation under the rule above shows that upon the tons of ore extracted and paid for on January 14, 1917, of the payment of 25c. per ton $0.2095 was for selling price or principal and $0.0405 was interest on the deferred payments and that on the 330,507 tons extracted the plaintiff was entitled to depletion of $69,251.05; that upon the ore paid for on April 10, 1917, $0.2074 was for selling price or principal and $0.0426 was interest on the deferred payments and that on the 48,958 tons extracted the plaintiff was entitled to depletion of $10,153.29; that on the ore paid

for on July 10, 1917, $0.2053 was for selling price or principal and $0.0447 was interest on the deferred payments and that on the 231,090 tons extracted plaintiff was entitled to depletion of $47,434.55; that upon the ore paid for on October 10, 1917, $0.2032 was for
11 selling price or principal and $0.0468 was interest on the deferred payments and that on the 432,120 tons extracted the plaintiff was entitled to depletion of $87,791.42; that plaintiff is entitled to depletion amounting for the year 1917 to $214,630.31.

Therefore, the plaintiff's income subject to tax amounted to $59,098.83 and the tax which was properly due was $3,384.16. Having previously paid a tax of $598.85 there was rightfully due from plaintiff the sum of $2,785.31 additional tax, and she was by the enforced payment complained of required to pay $30,023.83 more tax than she should have paid.

That there was rightfully due from plaintiff as interest the sum of $570.98 instead of $6,671.08, and plaintiff was required to pay $6,100.10 more than she should have done.

11. That the said returns were not wilful, false, or fraudulent and did not contain any wilful understatement or undervaluation.

12. Wherefore defendant became on, to wit, September 29, 1924, indebted to plaintiff in the sum of $36,123.93 for money received by defendant and held by the defendant to the use of the plaintiff, and thereupon on the last day aforesaid an obligation arose under a promise implied in law to pay said sum to the plaintiff with interest thereon at the lawful rate on the part of the defendant and said promise so arisen by implication of law is the promise of the defendant now sued upon in this action.

Yet the defendant not regarding her said promises has not paid the saumd of $36,123.93 or any part thereof to the plaintiff but has wholly refused to the damage of the plaintiff in the sum of $60,000 and therefore she bring this suit, etc.

Second count

1. For that whereas plaintiff is a citizen of the United States and a resident of the city of Chicago, county of Cook and State of Illinois; and the defendant at the times more specifically hereinafter mentioned was and now is a resident and an inhabitant of the said city of Chicago, and of the northern district of Illinois and of the eastern division thereof and was and still is the duly appointed and qualified United States collector of internal revenue for the first district of Illinois; and the plaintiff alleges:

2. That the plaintiff was the owner on March 1, 1913, of an undivided one-sixth interest in certain iron ore bearing lands situated in the cou'ty of St. Louis, State of Minnesota, more particularly described as follows:

12 Tract No. 1. Lots No. 3 and 4 in section 6, township 57 north of range 20 west of the fourth principal meridian, being the same as the north ½ of the northwest ¼ of said section 6.

Tract No. 2. The south ½ of the northeast ¼ and the northeast ¼ of the southeast ¼ of section 2, township 57 north, range 21 west of the fourth principal meridian.

Tract No. 3. The northwest ¼ of the southwest ¼ of section 1 and the southeast ¼ of the southeast ¼ of section 2, township 57 north, range 21 west of the fourth principal meridian.

Tract No. 4. Lot No. 2 of section 31 in township 58 north of range 17 west of the fourth principal meridian.

Tract No. 5. Lot No. 5 and the southeast ¼ of the northwest ¼ of section 6 in township 57 north, range 20 west of the fourth principal meridian.

Tract No. 6. The east ½ of the southeast ¼ of section 11 and the southeast ¼ of the northwest ¼ and the west ½ of the southwest ¼ of section 12, all in township 57 north, range 21 west of the fourth principal meridian, and the northwest ¼ of section 7, township 57, north, range 20 west of the fourth principal meridian.

Tract No. 7. The northeast ¼ of the northeast ¼ of section 7, township 57 north, range 17 west of the fourth principal meridian.

Tract No. 8. The northeast ¼ of the northeast ¼ of section 11, and the north ½ of the northwest ¼ of section 12, township 57 north, range 21 west of the fourth principal meridian.

Tract No. 9. The north ½ of the northeast ¼ and the southwest ¼ of the northeast ¼ of section 6, township 57 north, range 20 west of the fourth principal meridian.

Tract No. 10. The southwest ¼ of the southwest ¼ known as lot No. 3 of section 22, township 58 north, range 20 west of the fourth principal meridian.

Tract No. 11. The northwest ¼ of the southeast ¼ and the northeast ¼ of the southwest ¼ of section 6, township 57 north, range 20 west of the fourth principal meridian.

Tract No. 12. The southeast ¼ of the northeast ¼ of section 11 and the southwest ¼ of the northwest ¼ of section 12, township 57 north, Range 21 west of the fourth principal meridian.

Tract No. 13. The southwest ¼ of the southeast ¼ of the
13 southeast ¼ of the southwest ¼ of section 6, township 57 north, range 20 west of the fourth principal meridian.

That said tracts of land were on March 1, 1913, leased to various lessees, as follows:

Tracts Nos. 1, 2, 3, 4, and 5 for a term of forty-five (45) years from and after January 1, 1905, for the purposes of exploring for and mining, taking our and removing and shipping therefrom the merchantable iron ore therein upon a royalty at the rate of twenty-five cents (25c) per gross ton of two thousand two hundred and forty (2,240) pounds, due and payable on the 20th days of April, July, October, and January in each calendar year, with a guaranteed minimum yearly output of six hundred thousand (600,000) gross tons for the term. Such minimum royalty was payable quarterly whether or not sufficient ore was extracted to actually amount to same at the

prescribed royalty rate, but prepaid royalties might be credited against ore subsequently extracted in excess of the minimum. Royalties in excess of the minimum paid on ore extracted during any quarter might be applied on the minimum royalty for any subsequent quarter in the same year. The lessee agreed to pay all taxes and assessments and to keep the premises free and clear of all encumbrances arising from labor or mechanic's liens or claims, all covenants in the lease to run with the land. All of said leases covering the other tracts were substantially similar, except as follows:

The lease on tract No. 6 was for fifty (50) years from January 1, 1905, and the guaranteed minimum was three hundred thousand (300,000) gross tons for the last five years.

The lease on tract No. 7 was for fifty (50) years from January 1, 1902, and provided for a minimum annual royalty of fifty thousand (50,000) tons.

The lease on tract No. 8 was for fifty (50) years from January 1, 1902, and provided for a minimum annual royalty of one hundred thousand (100,000) tons.

The lease on tract No. 9 was for fifty (50) years from July 1, 1902, and provided for a minimum annual royalty of one hundred and fifty thousand (150,000) tons.

The lease on tract No. 10 was for fifty (50) years from January 1, 1903, and provided for a minimum annual royalty of fifty thousand (50,000) tons.

The lease on tract No. 11 was for fifty (50) years from October 1, 1902, and provided for a minimum annual royalty of one hundred thousand (100,000) tons.

14 The lease on tract No. 12 was for fifty (50) years from January 1, 1903, and provided for a minimum annual royalty of one hundred thousand (100,000) tons, and the lease on tract No. 13 was for twenty-five (25) years from October 1, 1903, and provided for a minimum annual royalty of fifty thousand (50,000) tons.

3. That during the calendar year 1918, plaintiff was in receipt of moneys under and by the terms of said leases for ore removed and to be removed from said lands amounting to $219,940.43.

4. That the plaintiff in order to comply with the provisions of the revenue act of 1918 in due course filed her income tax return for the calendar year 1918. That the plaintiff in said tax return showed the sum of $45,628.79 as net income. In arriving at such net income plaintiff deducted from her gross income the following items among others, namely:

Donations	$8,052.13
Depletion of mines	219,940.41
Taxes	1,084.90
Other deductions	9,025.99

leaving the amount of net income as above set out. Said return showed the sum of $7,778.92 due as income tax from plaintiff which said plaintiff promptly paid.

5. That thereafter the Commissioner of Internal Revenue (hereinafter called the "commissioner") purporting to act in reliance upon the provisions of said revenue acts of 1918, through the medium of a letter dated July 13, 1922, written on his behalf by E. E. Alden, internal revenue agent, stated that he was about to assess the plaintiff an additional income tax for the year 1918 based as is shown by said letter upon the conclusion that the amount of $8,052.13 deducted by plaintiff for donations in computing her said income, the amount of $9,025.99 for other deductions and the amount of $219,940.43 deducted by plaintiff for depletion were not correct, but that the sum of $21,348.51 was deductible for donations and the sum of $77,968.20 was deductible for depletion.

Said commissioner allowed a depletion of $0.0886243 per ton of ore for all ore removed from said ore bearing properties of said plaintiff and for each 25c of minimum royalty paid under and by the terms of said leases, such depletion per ton and the total depletion for the year being arrived at as follows:

15 On reserve March 1, 1913, according to the Minnesota tax commission as shown on questionnaire of the Royal Mineral Association ..... tons	191,417,150
Less advance royalty payment by lessees, prior to March 1, 1913 on ..... tons	3,034,258
Net tonnage as of March 1, 1913 ..... tons	188,382,892
Plaintiff's interest, one-sixth ..... tons	31,397,148.7
Total average yearly extraction, 1913 to 1918, inclusive	4,770,000
Maximum life of mine allowed ..... years	40
Interest rate allowed	6%
Royalty rate per ton	25c.
Capital returnable in 40 years	$7,849,287.18
Present worth of interest March 1, 1913	$2,782,551.64
Unit cost per ton, March 1, 1913	0.0886243
Depletion in 1917 ..... tons	1,040,289.4
at .0886243 per ton	$92,194.92

6. That thereafter the commissioner through the medium of a letter written on his behalf of J. G. Bright, deputy commissioner, stated that he was about to assess against plaintiff an amended income tax for the calendar year 1918 based as is shown by said letter upon the conclusion that the depletion to be allowed plaintiff should be increased over the amount stated in the letter of said Alden to $84,979.55 and that plaintiff should be allowed expenses of mining ore of $3,685.11. Said letter further stated that a total tax of $80,136.75 would be assessed against plaintiff. Pursuant to said letter the commissioner assessed the amount of $80,136.75 tax. Thereafter Mabel G. Reinecke, to wit, on September 19, 1924, who was then acting as collector of internal revenue for the first district of Illinois under the provisions of the revenue act of 1918, served on plaintiff a written notice and demand for tax, thereby demanding the payment by plaintiff at her office in Chicago, Illinois, on or before September 29, 1924, of an additional income tax for the calendar year 1918, which was the additional tax assessed as afore-

said and was in the amount of $72,357.83 and interest amounting to $13,144.88. That said notice and demand stated that failure to pay on or before September 29, 1924, the sum demanded as afore-
16 said would cause a 5% penalty to accrue with interest at 1% per month from date due until paid and that failure to pay the sum demanded would cause seizure and sale of the property of the plaintiff to be made.

7. That on, to wit, September 29, 1924, solely to avoid the threatened imposition of said penalties and interest for failure to pay and to avoid persecution and seizure and sale of her property and under duress, compulsion, and coercion, the plaintiff paid to the defendant the sum of $85,502.71 tax and interest so assessed against her and demanded from her as aforesaid as additional tax for the calendar year 1918 and interest thereon; but said payment was made under protest and at the same time plaintiff protested in writing that the assessment of said tax and interest and payment of said tax and interest was unlawful and deprived the plaintiff of rights secured to her by the Constitution of the United States and the revenue acts of the United States and the rules and regulations of the Treasury Department and the Bureau of Internal Revenue.

8. The plaintiff denies the conclusion of the commissioner in said assessment letter of J. G. Bright, deputy commissioner, that the sum of $84,979.55 is the correct amount of depletion to be deducted from the gross income from the said ore mines, and claims the right to deduct from said gross income depletion of $173,822.73, being $88,843.18 more than the amount allowed by the commissioner as depletion. By reason of the allowance of said additional depletion as claimed by plaintiff she claims that the deduction for charitable contributions allowed by the commissioner is excessive and should be $13,856.97 instead of $17,677.72, and that the net income of the said plaintiff subject to tax rightfully amounts to $85,685.33 instead of $171,971.81 as fixed by the commissioner.

9. That after the payment by the plaintiff to the defendant of $85,502.71 additional tax and interest as aforesaid on, to wit, January 20th, 1926, the plaintiff made and filed with the defendant for transmission to the commissioner on application, appeal and claim, No. 843, for the refund of the sum of $62,767.52 of said additional tax and interest so assessed and demanded as aforesaid, in manner and form as provided in section 3226 in the Revised States of the United States, the provisions of law in that regard and the regulations of the Secretary of the Treasury in pursuance of that law. Thereafter, by letter dated 12, 1926, the commissioner rejected said claim in full.

10. That the value or market price of said ore in the
17 ground untouched and unextracted on March 1, 1913, and on all dates subsequent thereto, exceeded the sum of twenty-five cents per ton, so that every ton of ore paid for under said leases in the year 1918 was disposed of at a price actually less than the market price of the ore, and if then sold free of said lease, would

have realized more than twenty-five cents per ton. The actual depletion of the mines by each ton of ore extracted was more than twenty-five cents when extracted.

That under the terms of the law the depletion for ore extracted or considered to be extracted was fixed at the market value of the ore in places in the mine at the time and place of extraction, but if such depletion allowance per ton exceeded the amount fixed as the royalty per ton in the lease, the depletion allowance to the plaintiff could not exceed such royalty, but since the royalty when paid included an amount of interest on the payment considered as deferred from March 1, 1913, to the date of actual payment of royalty and the allowance of such depletion in successive years could never exceed the market value of the ore in the mine on March 1, 1913.

That each payment for ore extracted consisted of two parts, one of which was interest on the deferred payment and the other of which was the actual present worth of the payment deferred from March 1, 1913. Said actual present worth is accurately represented for each ton by that sum which put at interest on March 1, 1913, would produce at the date of payment for ore the royalty paid per ton; to put it in another way, the actual present worth of the ore extracted is accurately ascertained by taking from the royalty per ton paid the part of the royalty, when and as paid, which represented interest on the deferred payment from March 1, 1913.

That such an allowance of depletion in successive years and in the year 1918 did not and could not exceed the market value of such ore on March 1, 1913.

That the method of calculating the depletion followed by the Government taxing body assumed the average present worth of the ore extracted for all the years, as the present worth of the ore extracted in each particular year and asserted that a payment for ore made in 1918, upon which the seller had waited for payment less than four years, was made up of precisely the same amounts of principal and interest as that for ore upon which the seller had been or would be compelled to wait for from twenty to forty years; that there was precisely as much interest in a payment of twenty-five
18 cents per ton deferred for four years as in a payment of twenty-five cents per ton deferred for forty years.

The Government arrived at the present worth as of March 1, 1913, substantially in the following manner, to wit:

The total value of the ore was found by multiplying the total tonnage as estimated by the Minnesota Tax Commission by the 25c royalty fixed by the lease. This sum was divided into forty years. It was assumed that one such part would be received by the taxpayer in each year of the estimated life of the mine. Each sum was then discounted at the rate of 6% for the period of time which would elapse between March 1, 1913, until same would be received by the taxpayer. After deducting the discount the remaining sums were added and the resulting amount was assumed to be the present worth.

Conceding that such method is a correct one, it follows that the present worth of ore extracted in any one year is definitely ascertained, and that the ore extracted in different years has a different present worth and therefore a different value to the taxpayer. On the Government's own theory, as presented above, the unit of depletion can not properly be averaged for all the years.

That the Government's calculation admits that the present worth of the ore in a particular year was the amount for which depletion should be allowed, but disregards the terms of the lease by treating the ore as sold on March 1, 1913, at the averaged present worth for all the years of the lease.

That the present worth as of March 1, 1913, of the ore cannot be accurately determined under the leases until the ore is actually extracted and the date of payment therefor thereby determined.

That the Government's system of figuring the present worth for the purpose of determining depletion as fixed in the sum exacted from the plaintiff as income tax requires assumptions, not one of which if justified, namely, first that precisely the same amount of ore will be extracted each year; second, that the mines have an arbitrary life of the term of each lease; third, that the exact amount of ore in the mine will be extracted precisely with the expiration of the term of the lease.

That the Government's method of determining the present worth as of March 1, 1913, and from that the depletion unit requires the use of a 6% rate of discount. The taxpayer maintains that such rate of discount is unreasonably large and is not the proper reasonable and prevailing rate in such a case as is here involved, even
19 though it may be in the case of mines operated by the taxpayer. The reason is that the taxpayer has none of the hazards of the ordinary operating mine owner. Here the ore is worth in the market upwards of $1.00 per ton, the royalty is but 25c. per ton; it is a necessary product in the industrial life of the Nation; the lessees are financially beyond question, and even though they were to fall into financial difficulties, these leases, being assets of great value, would under any conceivable circumstances be surrendered. Therefore such properties are comparable with the very best of non-tax exempt securities, the prevailing rate of interest on which is about five per cent.

The amount of the interest rate being determined the correct method of figuring depletion requires the determination of only one fact fully ascertained before the return of the taxpayer is made, viz, the date of payment for ore.

That if of each payment or each ton of ore extracted, the amount of such payment which represents interest on the payment as deferred and actually paid, be figured, the income of the owner will be accurately determined as that part of the twenty-five cents, which represents interest.

That for the year 1918 a correct calculation under the rule above shows that upon the tons of ore extracted and paid for on January 10, 1918, of the payment of 25c. per ton $0.2011 was for selling price or principal and $0.0489 was interest on the deferred payments and that on the 252,502.88 tons extracted the plaintiff was entitled to depletion of $50,778.82; that upon the ore paid for on April 10, 1918, $0.1991 was for selling price or principal and $0.0509 was interest on the deferred payments and that on the 48,958 tons extracted the plaintiff was entitled to depletion of $9,748.90; that on the ore paid for on July 10, 1918, $0.1972 was for selling price or principal and $0.0528 was interest on the deferred payments and that on the 221,-165.84 tons extracted plaintiff was entitled to depletion of $43,607.14; that upon the ore paid for on October 10, 1918, $0.1952 was for selling price or principal and $0.0548 was interest on the deferred payments and that on the 356,954.64 tons extractd the plaintiff was entitled to depletion of $69.687.87; that plaintiff is entitled to depletion amounting for the year 1918 to $173,822.73.

Therefore the plaintiff's income subject to tax amounted to $85,-685.33 and the tax which was properly due was $24,261.84. Having previously paid a tax of $7,778.92 there was rightfully due from the plaintiff the sum of $16,482.92 additional tax, and she was by the enforced payment complained of required to pay $55,-874.91 more tax than she should have paid.

That there was rightfully due from plaintiff as interest the sum of $2,991.69 instead of $13,144.88, and plaintiff was required to pay $10,153.19 more than she should have done.

11. That the said returns were not wilful, false or fraudulent and did not contain any wilful understatement or undervaluation.

12. Wherefore, defendant became on, to wit, September 29, 1924, indebted to plaintiff in the sum of $65,028.10, for money received by defendant and held by the defendant to the use of the plaintiff, and thereupon on the last day aforesaid an obligation arose under a promise implied in law to pay said sum to the plaintiff with interest thereon at the lawful rate on the part of the defendant and said promise so arisen by implication of law is the promise of the defendant now sued in this action.

Yet the defendant not regarding her said promises has not paid the said sum of $65,028.10 or any part thereof to the plaintiff but has wholly refused to the damage of the plaintiff in the sum of $100,-000.00, and therefore she brings this suit, etc.

JOHN M. ZANE,
HENRY A. GARDNER,
ALFRED T. CARTON,
URBAN A. LAVERY,
Attorneys for Plaintiff.

[File indorsement omitted.]

In United States District Court

Plea

Filed Dec. 27, 1926

Now comes the above-named defendant, Mabel G. Reinecke, collector of internal revenue of the United States of America for the first collection district of Illinois, by Edwin A. Olson, United States attorney, her attorney, and defends the wrong and injury,
21 when, etc., and says that she did not promise in manner and form as the plaintiff has above thereof complained against her, and of this the defendant puts herself upon the country, etc.

(Signed) EDWIN A. OLSON,
United States Attorney.

[File indorsement omitted.]

In United States District Court

Minute entries

Thursday, May 3, 1928

Motions to instruct jury

Present: Honorable JAMES H. WILKERSON, judge of said court

This cause being called for trial come the parties to this suit by their attorneys, respectively, and issues being joined herein it is ordered that a jury come whereupon come the jurors of a jury of good and lawful men, to wit: Morris Brown, Leo Feeney, Henry E. Miller, Edward J. Dillon, Hugh Mitchell, E. Lahey, Oscar Siegel, John P. Moehling, Joe Haggerty, Henry Raber, A. N. Robert, H. Brower, who are duly elected, impaneled, and sworn herein a true verdict to render according to the evidence, and thereupon at the close of plaintiff's opening statement the defendant by her attorney moves the court to instruct the jury to find the issues for the defendant whereupon the plaintiff's attorney moves the court to instruct the jury to find the issues for the plaintiff which motions are hereby heard and continued to 10 a. m. May 4, A. D. 1928.

It is further ordered that said jury be permitted to separate until 10 a. m. May 4, A. D. 1928.

22 *Order overruling motions to instruct jury*

Friday, May 4, 1928

Present: Honorable JAMES H. WILKERSON, judge of said court

This cause coming on to be heard upon the plaintiff and defendant's motions at the close of plaintiff's opening statement for the

court to instruct the jury, and the court having heard arguments of counsel and being now fully advised in the premises said motions are overruled and denied to which ruling of the court the plaintiff and defendant by their attorneys here and now duly except.

Order granting leave to amend declaration

Friday, May 4, 1928

Present: Honorable JAMES H. WILKERSON, judge of said court

This day again come the parties to this suit by their attorneys respectively, and the jury heretofore impaneled herein for the trial of said cause also come and thereupon on motion of plaintiff's attorney, it is ordered that leave be and the same is hereby given the plaintiff to amend instanter the declaration filed in said cause on its face and thereupon at the close of all the evidence the defendant and the plaintiff by their attorneys enter herein their motion for the court to instruct the jury, which motion is entered and continued to May 8, A. D. 1928, for disposition.

It is further ordered that said jury be permitted to separate until 10 a. m. May 8, A. D. 1928.

23 In United States District Court

Defendant's motion to instruct jury

Filed May 8, 1928

Defendant moves the court to instruct the jury that under the pleading and evidence in this case there is not sufficient evidence to entitle the plaintiff to recover and the verdict must be for the defendant because:

1. There is no legally sufficient evidence to show the fair market value as of March 1, 1913, of the plaintiff's interest in each of the mines involved in this action.

2. There is no legally sufficient evidence to show the tonnage known or estimated remaining in the respective mines as of December 31, 1916, December 31, 1917, December 31, 1918, and December 31, 1919, respectively.

3. The undisputed evidence shows that the method for calculating depletion allowance used by the plaintiff does not result in reasonable allowance.

4. The undisputed evidence shows that the method of calculating depletion allowance used by the plaintiff is not in compliance with the regulations of the Commission of Internal Revenue duly promulgated.

5. The undisputed evidence shows that the allowances computed by the plaintiff are not a percentage of his capital invested equal to

the percentage of the whole mineral content withdrawn during the year, and are not a percentage of his capital investment equal to the percentage of the unpaid royalties paid during the year for which the calculation is made.

6. And for other good and sufficient reasons.

24 In United States District Court

Plaintiff's motion to instruct jury

Filed May 8, 1928

Now comes the plaintiff at the close of all the evidence, the defendant having made a motion that the jury be peremptorily instructed to return a verdict for the defendant of no cause of action, and the plaintiff moves the court to instruct the jury to return a verdict in favor of the plaintiff and to find the plaintiff's damages against the defendant at the sum of one hundred eighteen thousand forty-three and 21/100 dollars ($118,043.21) for principal and interest to this date. Said motion for plaintiff is based upon the ground that the evidence for the plaintiff shows without contradiction that plaintiff is entitled to recover herein and the evidence shows without contradiction that the amount of recovery should be the sum stated, and that defendant has offered no competent material and relevant evidence to raise any issue of fact.

And both plaintiff and defendant having so moved, the plaintiff submits the cause to the court for its finding and decision.

Dated May 4, 1928.

_____ _____,
_____ _____,
Attorneys for Plaintiff.

[File indorsement omitted.]

25 In United States District Court

Verdict returned in open court

Filed May 8, 1928

We, the jury, find the issues for the plaintiff and assess the plaintiff's damages at the sum of one hundred eighteen thousand forty-three dollars and twenty-one cents.

LEO J. FEENEY.
HENRY E. MILLER.
HENRY BROWER.
MORRIS M. BROWN.
EDWARD J. DILLON.
ARTHUR N. ROOT.
EDWIN LAHEY.
HUGH MITCHELL.
HARRY RABER.
J. J. HAGGERTY.
JOHN P. MOEHLING.
OSCAR SIGEL.

In United States District Court

Judgment

May 8, 1928

This day again come the parties to this suit by their attorneys, respectively, and the jury heretofore impaneled herein for the trial of said cause also come thereupon this cause coming on to be heard upon the defendants motion for a directed verdict after arguments of counsel and due deliberation by the court said motion is overruled and denied and thereupon on motion of plaintiff's attorney the court instructs the jury to find the issues for the plaintiff and assess the plaintiff's damages to the sum of one hundred eighteen thousand forty-three dollars and twenty-one cents ($118,043.21)
26 and the jury say: We the jury find the issues for the plaintiff and assess the plaintiff's damages at the sum of one hundred eighteen thousand forty-three dollars and twenty-one cents ($118,043.21) in form as aforesaid by the jury assessed and have execution therefor whereupon the defendant enters herein her motion for a new trial in said cause which motion is overruled and a new trial denied whereupon the defendant enters herein her motion in arrest of judgment which motion is also overruled and denied to which ruling of the court the defendant here and now duly excepts and sixty days time from this date is allowed the defendant within which to file her bill of exceptions herein.

In United States District Court

Stipulation re extension of time

Filed July 3, 1928

It is hereby stipulated and agreed, by and between the parties to the above-entitled cause, by their respective attorneys, that the time for the defendant Mabel G. Reinecke, collector of internal revenue for the first district of Illinois, to present and settle the bill of exceptions and to have the same approved and filed in the above entitled cause be extended to and including August 6, 1928.

GEORGE E. Q. JOHNSON,
United States Attorney,
Attorney for Defendant,
JOHN M. ZANE,
HENRY A. GARDNER,
ALFERD T. CARTON,
URBAN A. LAVERY,
Attorneys for Plaintiff.

[File indorsement omitted.]

27 In United States District Court

Order extending time

July 3, 1928

On motion of defendant and pursuant to stipulation signed by the parties, it is hereby ordered that the time for the defendant Mabel G. Reinecke, collector of internal revenue for the first district of Illinois, to present and settle the bill of exceptions and have the same approved and filed in the above-entitled cause be extended to and including August 6, 1928.

Enter:

JAMES H. WILKERSON,
United States District Judge.

In United States District Court

Order incorporating original bill of exceptions

July 13, 1928

On motion of defendant, it is hereby ordered that the original bill of exceptions may be incorporated in the record on appeal to the United States Circuit Court of Appeals for the Seventh Circuit in this cause in lieu of a copy thereof.

Enter:

JAMES H. WILKERSON,
Judge of the United States District Court for the Northern District of Illinois, Eastern Division.

28 In United States District Court

Bill of exceptions

Filed July 13, 1928

Caption

Be it remembered that heretofore, towit, on the 3rd day of May, A. D. 1928, being one of the days of said term of said court, before the Hon. James H. Wilkerson, one of the judges of said court, and a jury, this cause came on for trial upon the pleadings heretofore filed herein.

Henry A. Gardner, Messrs. Zane, Morse & Norman, by John M. Zane, appeared for plaintiff; George E. Q. Johnson, United States attorney, by Dwight H. Green, special assistant United States attorney, and Thomas H. Lewis, appeared for defendant.

And thereupon the plaintiff, to maintain the issues on her part introduced the following evidence:

HENRY A. GARDNER, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct examination by Mr. ZANE:

Am forty-five years old and live at 845 Bryant Avenue, Winnetka, Cook County, Illinois. Am an attorney at law and am acquainted with the plaintiff, Eudora Hull Spalding, and have represented her for about fifteen or sixteen years. I am acquainted with the facts in regard to the matter in dispute in this case. I have the original income-tax returns filed by the plaintiff for the years 1917 and 1918, the same having been delivered to me by counsel in this case.

Q. Now, the papers which you have in your hand are respectively the income-tax return for 1917 and 1918?

A. 1917 and 1918; yes, sir.

Mr. ZANE. If your honor please, we will ask the reporter to make the return for 1917 as plaintiff's Exhibit A and the return for 1918 as plaintiff's Exhibit B and we offer——

Mr. LEWIS. Just a minute before you do that. I want to have photostats marked instead because these official papers.

Mr. ZANE. All right. He wants to put in the photostats, and we have no objection.

29 The COURT. You may offer the original and it will be received and it will be understood that photostatic copies of the same may be used in lieu of the original.

Mr. LEWIS. I just did not want the originals marked; that is all.

Mr. ZANE. Well, that is just what we want to show, that the originals are produced.

Mr. LEWIS. Well, all right. Go ahead.

Mr. ZANE. It won't do any harm.

The COURT. If he does not want the original marked, the record will show that upon the introduction of the originals, counsel for the United States produced photostatic copies of the same and it is agreed they are the same, and the copies may be marked with the same effect as though they were the originals.

Mr. LEWIS. The statute provides for that.

Mr. ZANE. That will be satisfactory. We will ask the reporter to mark the substituted copies as photostatic copies of the return for 1917 as "Plaintiff's Exhibit A" and the return for 1918 as "Plaintiff's Exhibit B," and we offer them in evidence, your honor.

The COURT. They will be admitted.

(Said documents so offered are admitted in evidence marked "Plaintiff's Exhibits A and B," respectively.)

WITNESS. I am familiar with the amounts received by the plaintiff in the years 1917 and 1918 and the dates when they were received. I am also familiar with the fact that these amounts were received by the plaintiff under the terms of certain leases at the rate of 25c.

per ton. During the year 1917 the plaintiff received $260,072.30. The total tonnage would be four times this figure and six times that. During the year 1918 the plaintiff received $219,940.43, and the total would be four times that and the total tonnage on entire mines would be six times that. The amounts were paid on January 10, April 10, July 10, and October 10, in different amounts, depending on the extraction of the previous quarter. I have the quarterly returns that make up the total. The plaintiff received amounts as follows:

January 10, 1917	$82,626.93
April 10, 1917	12,239.58
July 10, 1917	57,772.68
October 10, 1917	108,031.55
January 10, 1918	63,125.72
April 10, 1918	12,239.54
July 10, 1918	55,291.46
October 10, 1918	89,238.66

30 In 1917 the total tonnage extracted was 6,256,098 and the plaintiff had an undivided one-sixth interest in that. In 1918 there was a total extraction of 5,278,570 tons, the plaintiff's share being one-sixth of that.

JOHN A. SAVAGE, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct examination by Mr. ZANE:

Live at Duluth, Minnesota. I have lived in Hibbing, Minnesota, and Duluth, Minnesota, for twenty-one years. I am forty-four years old. From 1907 until 1914 I lived in Hibbing and I was general superintendent and general manager of the Shenango Furnace Company, a Pennsylvania company, operating several iron mines at Hibbing and vicinity. Since then I have lived in Duluth, and I have been in business for myself under the name of John A. Savage & Company, developing iron mines, selling iron ore, and conducting a general iron mining business. I have been acquainted with the selling and mining of iron ore in the so-called iron ranges of Minnesota, the Mesaba Range, the Cuyuna Range, and somewhat on the Vermillion Range.

I am acquainted with the ground or land contained in the leases mentioned in this case and made by the co-owners, one of whom was Mrs. Spalding, upon certain iron lands in Minnesota. Those lands are situated at Hibbing, Minnesota, on the Mesaba Iron Range. I lived in Hibbing for seven years, and during that period I was in charge of one of the properties in this situation; lived on it and walked across these other properties two to six times a day for seven years. I was quite familiar with it. I am familiar with the grade of iron ore that comes out of that ground, and which was coming out in those years and since that time. The grade of iron ore in those lands with reference to the phrase used in the leases "merchantable iron ore" was unusually good merchantable ore. That iron ore carried approximately 54 natural units of iron out of a possible 100, or 54 per cent. That is classed in the trade of selling

iron ore as exceptionally high grade. I was acquainted with the market value of iron ore by the ton in the mine untouched and without any labor put upon it on the date of March 1, 1913.

Mr. LEWIS. That is all right.

Mr. ZONE. Yes; that is the heart of it. He objects to it.

31 Mr. LEWIS. Well, I do not object to his answering, yes, that he knows it.

WITNESS. I know it.

Mr. ZONE. He knows it. All right.

Q. What was the market value?

Mr. LEWIS. Just a minute.

Mr. ZANE. That is the point.

Mr. LEWIS. I ask counsel to state the purpose of this evidence.

Mr. ZANE. The purpose is to conform to the law, which is that we must present to the court, in order to measure the depletion, the market value of the ore in the ground untouched and unextracted on March 1, 1913, to show the original cost, value, market value on that date.

The COURT. I overrule the objection for the present.

Mr. LEWIS. Note an exception.

The COURT. If upon the argument of the case, at the close of the evidence, I feel I should rule in your favor, I can very readily strike it out.

Mr. ZANE. Yes.

The COURT. He may answer the question.

Mr. ZANE. Q. I asked, was that market value of this iron ore on March 1, 1913?

A. At least 25 cents per ton.

Q. Now, did that value—as to the year of 1917, throughout that year, do you know the market value of the iron ore of the description of these mines by the ton at that place in the market?

Mr. LEWIS. Answer yes or no.

A. Yes, sir.

Mr. ZANE. He says yes. What was that value?

Mr. LEWIS. Now, we object to that.

The COURT. Overruled.

Mr. LEWIS. Exception.

A. At least 25 cents per ton.

Mr. ZANE. Q. What was the—are you acquainted with the market value in 1918, throughout the year?

A. Yes, sir.

Q. What was that value?

Mr. LEWIS. Object to that question.

The COURT. Overruled.

A. At least 25 cents per ton.

Mr. LEWIS. Note our exception.

Mr. ZANE. Q. Now, in the intervening time from March

32 1, 1913, up to 1917, do you know the market value of what I have stated?

A. Yes, sir.

Q. What was that market value?

Mr. LEWIS. Objected to.

The COURT. Overruled.

A. At least 25 cents per ton.

Mr. LEWIS. The court ruled on that objection, did he not?

The COURT. Yes, and your exception may be noted.

Cross-examination by Mr. LEWIS:

Q. You say the March 1 value of this ton of ore, March 1, 1913, value of a ton of ore, was at least 25 cents?

A. Yes, sir.

Q. You do not mean by that that Mrs. Spalding's interest in that ton of ore was worth at least 25 cents, do you?

A. The question asked me by Mr. Zane did not involve any lease, as I understood the question.

Mr. ZANE. Just the ton of ore.

Mr. LEWIS. Q. I mean, you do not mean to testify that Mrs. Spalding's interest in that ton of ore as of March 1, 1913, or at any other time, was worth 25 cents or any other sum?

Mr. ZANE. We object. That is calling for a legal conclusion.

The COURT. I suppose he meant to testify precisely as he has testified, as to the value of the ore, as such, without reference to who owned, how many interests there were in it, simply the value of the ore.

Mr. ZANE. That is all. We are not talking about Mrs. Spalding; she either had one-sixth of each ton or one-sixth of all the tons.

The COURT. He testified to the value of the ore.

Mr. LEWIS. The court refuses to permit that question to be answered?

The COURT. He may answer it.

Mr. ZANE. I have an objection to the question.

The COURT. I overrule the objection.

Mr. LEWIS. Note our exception.

The COURT. I am ruling in your favor.

Mr. LEWIS. Oh, you are admitting it?

Mr. ZANE. The witness had already said that that was a statement without reference to any lease or anything.

The COURT. Read the question.

33 (Question read.)

A. That question is based upon Mrs. Spalding's one-sixth ownership of a lease at 25 cents per ton. That question is an entirely different one from the one asked me by Mr. Zane. It would require a good deal of calculation and certain assumptions as to how fast that ore would be shipped. Then it would require discounting against those assumptions to present value. That calculation would take time, and I can not answer that without working it out.

The COURT. Q. You were merely testifying as to the value of the ore?

A. Regardless of who owned it or what lease or anything else, there might be on it; just that tonnage in place as real estate, in the ground.

Q. I so understood it.

A. Yes, sir.

Mr. Lewis. Now, if the court please, I do not know whether it is necessary; I am simply trying to protect this record, and for that reason I make a motion to strike out this evidence relating to the value of the ton of ore.

The Court. The objection is overruled.

Charles L. Keith, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct examination by Mr. Zane:

Reside at Madison, Wisconsin. Am a geologist, chairman of the department of geology at the University of Wisconsin, and consulting geologist in connection with mining. For twenty-five years my general consulting practice has related largely to iron ores in North America, South America, and western Europe. During that time I also acted in consulting capacity to various State and Government organizations in which iron ore figured. I was consulting geologist and appraiser of the Michigan State Tax Commission and for the Wisconsin State Tax Commission. I was consulting geologist for the War Industries Board for the American Commission to Negotiate Peace in Paris, and am now serving in that capacity for the Bureau of Mines and the United States War Department. I was on the United States Geological Survey in regard to Lake Superior, more particularly the iron ore of the Lake Superior region. Leading to the publication of Government maps and
34 reports on that district I was the author of the report on the Mesaba district in Minnesota, the range which contains the Hibbing mines and which are now in question. I was also joint author of the general report of the entire region. For a number of years I have acted in a consulting capacity in regard to exploration and development and valuation of Lake Superior mines and at the present time am acting as consulting geologist for forty of them. I stated my knowledge of the particular mines that the plaintiff, Mrs. Spalding, was interested in on the Mesaba Range in some detail in the preparation of the Government report, Geological Survey report on the Mesaba district, and since that time I have been generally familiar with them, having been in the mines at intervals through a great many years.

I know, generally speaking, of the quality of the iron ore in the mines of Mrs. Spalding. It was a standard high grade of iron ore. I have heard the testimony about the amount of iron ore extracted. I can tell you from my knowledge and experience the value, and by value I mean the market value of the ore in Mrs. Spalding's ground untouched and unextracted on the first day of March, 1913.

Q. What was that market value?
Mr. LEWIS. We object to it.
The COURT. Overruled.
Mr. LEWIS. Exception.
A. Well above 25 cents per ton.
Mr. ZANE. I will ask a general question to shorten it; it may be somewhat leading; if you object I will withdraw it.
Mr. LEWIS. We won't object on the ground it is leading.
Q. Now, are you acquainted with the market value in the year 1917 at that place?
A. Yes.
Q. What was that market value?
Mr. LEWIS. Object.
The COURT. Overruled.
Mr. LEWIS. Exception.
A. At least as much as in 1913.
Mr. ZANE. Q. Were you acquainted with the value in the year 1918 at that place, of that ore?
A. I was.
Q. And what was that value?
Mr. LEWIS. Objection.
The COURT. Overruled.
Mr. LEWIS. Exception.
Mr. ZANE. Q. Answer it.
A. At least as much as in 1913.
35 Q. And were you acquainted with the value of that ore between March 1, 1913, and the beginning of 1917?
A. Yes.
Q. And what was that value?
Mr. LEWIS. Objection.
The COURT. Overruled.
Mr. LEWIS. Exception.
A. The same.

Cross-examination by Mr. Lewis:

Mrs. Spalding's interest in a ton of ore was not necessarily as of March 1, 1913, of the fair market value of over 25c. a ton. In testifying as to the value of a ton of ore I was not speaking of Mrs. Spalding's interest, or of anyone's interest. I was speaking of the value of a ton of ore regardless of ownership. I do not know of my own knowledge what Mrs. Spalding's interest of a ton of ore was as of March 1, 1913.

Mr. LEWIS. All right. That is all. I make a motion to strike that testimony of Dr. Leith's on the same ground.
The COURT. Overruled.
Mr. LEWIS. Note our exception.
The COURT. Proceed.

EDWARD L. IVES, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct examination by Mr. Zane:

Reside at Wilmette, Illinois. Have resided there for four years. My age is fifty. From 1900 until 1906 I was in the engineering department of the Newport News Shipbuilding & Dry Dock Company. In 1906 I entered the blast furnace department of the Illinois Steel Company at South Chicago. I stayed there until 1912, when I accepted a position as blast furnace manager for the Iroquois Iron Company, South Chicago. That company was sold in 1916 to the Steel & Tube Company of America. I contained as blast furnace superintendent until March, 1920, when I resigned. I then entered the employment of the Miami Metals Company as a consulting engineer, specializing in the manufacture of pig iron. In 1923 H. A. Prassett and myself formed the consulting firm of H. A. Prassett & Company. I am vice president of that company now, consulting engineer specializing in the manufacture of pig iron.

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The duties of a blast-furnace superintendent require him to purchase the ore which he uses. I have been actively purchasing ore from 1912 to date. Since being in the consulting business, we have purchased for various companies, some of them being the Tonowonda Iron Corporation, the Clair Furnace Company, and the A. M. Byers Company. I am acquainted with the Susequehanna mine, one mine of the group under discussion, and was consulting engineer for the operator of that mine for five years. I was acquainted with the quality of iron ore in that mine. It was standard grade Mesaba ore. It would average about 49.5 per cent units of iron in the natural state. About one-third of the ore in there was a Bessemer grade—that is, low phosphorus. In that particular mine the iron ore was 49.50, which you would say is a high-grade ore, but a penalty ore, due to the fact that the ore naturally was below the base of 51.50. It was not like the Hull-Rust and the others which are very high-grade ore. It was an open-pit mine; that is, the overburden had been removed and the ore was loaded by steam shovel into the cars. That is the cheapest method of working.

Q. Now, are you able to tell us from your experience that you have described, what the value of that tonnage was in these mines by the ton on the first day of March, 1913?

A. It was more than twenty-five——

Mr. LEWIS. Wait just a minute. Yes or no.

Mr. ZANE. Q. Yes or no; do you know?

A. Yes.

Q. Then what was that value?

Mr. LEWIS. We object to that.

A. More than 25 cents a ton.

Mr. ZANE. Wait just a moment. Give them a chance. He wants to object. I have asked him what was the value, and he has made his regular objection.

Mr. LEWIS. We have objected to the witness——

The COURT. Objection overruled.

Mr. LEWIS. Exception.

Mr. ZANE. Q. What was the value?

A. More than 25 cents a ton.

Q. And you mean by that the ton in the mine untouched and unextracted?

A. Yes.

Q. Now, can you tell us what that value was between March 1, 1913, and the end of 1918, all during that period?

37 A. More than 25 cents.

Mr. LEWIS. Wait a minute. Yes or no.

Mr. ZANE. Q. Just yes or no.

A. Yes.

Q. Then he gets his chance, you see. How much was that value?

Mr. LEWIS. We object.

The COURT. The objection is overruled.

Mr. LEWIS. Exception.

Mr. ZANE. Q. Now you can answer.

A. More than 25 cents a ton.

Cross-examination by Mr. LEWIS:

I do not know what the value of Mrs. Spalding's interest in any ton of ore would be.

HENRY A. GARDNER, recalled as a witness on behalf of the plaintiff, having been previously sworn, testified as follows:

Direct examination by Mr. ZANE:

I have seen the original leases upon this land that is spoken of here in the evidence. I have those leases.

Mr. ZANE. We offer in evidence this lease, plaintiff's Exhibit C, and the lease on tract 8 we ask to have market "Plaintiff's Exhibit D," and we offer that in evidence; and the lease on tract 9, which we will ask to have marked "Plaintiff's Exhibit E, we offer in evidence; and the lease on tract 10, which we will ask to have marked "Plaintiff's Exhibit F" and will offer that in evidence; and the lease on tract 11, marked "Plaintiff's Exhibit G," we offer in evidence; and the lease on tract 12, "Plaintiff's Exhibit H," we offer in evidence; and the lease on tract 13, "Plaintiff's Exhibit I," we offer in evidence.

(Said documents so offered were admitted in evidence, marked "Plaintiff's Exhibits C, D, E, F, G, H, and I.")

Mr. ZANE. I think we will ask here—we had better ask to substitute copies instead of the originals, your honor. The original papers ought really to be kept, I suppose; they might get mixed up in the record.

The COURT. If there be no objection.

Mr. LEWIS. All right.

WITNESS. The original tax return of Mrs. Spalding was
38 made out in my office, under my supervision. I was acquainted with the items in it.

Q. Now, in that tax return, in regard to that tax return I wish you would state whether or not that was made under your advice as to the items that should go in there?

A. Mrs. Spalding, together with other owners of mineral lands, was uncertain as to what deductions should be made for depletion, and they consulted—I do not know exactly whom they consulted, but it was some attorneys acting for the group, and they advised the——

Mr. LEWIS. Now, what do you want to prove by him?

Mr. ZANE. That she made the original return in good faith, without any intention of defrauding; that is all.

Mr. LEWIS. We admit that.

Q. Now, have you there the copy of the letter of the revenue agent dated July 13, 1922?

A. I have.

Mr. ZANE. We will ask to have that marked "Plaintiff's Exhibit J," and offer it in evidence.

Mr. LEWIS. I ask for what purpose it is offered.

Mr. ZANE. To show how the return was finally settled and the items, so that there would be no question about it.

Mr. LEWIS. We object to the offer.

Mr. ZANE. And it is the document upon which the additional assessment that she was compelled to pay was founded.

The COURT. What is the objection?

Mr. LEWIS. The objection is, it is not binding on the commissioner. It is from the revenue agent, this letter they propose to introduce.

The COURT. Is it the position of the United States that the computation stated in the letter of the revenue agent is erroneous?

Mr. LEWIS. It is not a computation that was finally made.

Mr. ZANE. Well, we want to show how it was done.

The COURT. Is that the only purpose for which it is offered?

Mr. LEWIS. We object.

The COURT. As merely showing one link in the chain of events making the assessment?

Mr. ZANE. We do not say they are bound.

The COURT. Of course, it is not binding on the commissioner.

Mr. ZANE. The commissioner actually fixed it.

The COURT. For the limited purpose for which it is offered, it may be received.

Mr. LEWIS. Now, may I state my objection in the record?
39 Counsel states that he offers the revenue agent's report for the purpose of showing the method used by the commissioner in determining the depletion allowance made in these cases. The defendant objects to the admission on the ground, first, that the method used by the revenue agent has no tendency to show the

method used by the commissioner; and secondly, that the method used by the commissioner is entirely immaterial in this case.

The COURT. The method used by the commissioner?

Mr. LEWIS. Yes.

The COURT. You say the method used by the commissioner?

Mr. LEWIS. Yes.

Mr. ZANE. Why, who does assess this tax?

Mr. LEWIS. Why, the question is simply whether or not the allowance made is right or wrong. That is the question in this case.

The COURT. Who made it?

Mr. LEWIS. It does not make any difference how it was made.

The COURT. I do not understand that counsel is offering it—the only purpose stated by counsel is as he stated. I do not understand he offers it as showing the method by which the tax was fixed; he is offering it here as one step in the process of arriving at how the tax was assessed, in order that the subsequent proceedings in the office of the commissioner may be intelligible.

Mr. ZANE. Yes, sir; you are right.

The COURT. As I understand the objection of the United States, it does not state accurately. For the purpose for which it is offered the objection will be overruled.

Mr. LEWIS. Note our exception.

(Said document so offered and admitted in evidence was marked "Plaintiff's Exhibit J.")

Mr. ZANE. We will ask to have this letter of the commissioner marked "Plaintiff's Exhibit K," and we offer it in evidence.

Mr. LEWIS. Now, you do not offer this as to 1916?

Mr. ZANE. No; it is 1917 this is offered for.

The WITNESS. It covers both '16 and '17.

Mr. ZANE. Well, but '16 does not have anything to do with it.

Mr. LEWIS. I haven't any objection.

(Said document so offered and admitted in evidence was marked "Plaintiff's Exhibit K.")

Mr. ZANE. We next offer in evidence the letter of——

A. It is a letter of the revenue agent.

Mr. ZANE. Internal-revenue agent in charge, dated June 20, 1922.

Mr. LEWIS. That is, enclosing the report.

Mr. ZANE. Yes; and the report that is enclosed with that letter; it is all pinned together here.

Mr. LEWIS. This is not complete.

Mr. ZANE. Yes; it is.

Mr. LEWIS. You want '17, don't you?

The WITNESS. That includes '17 and '18.

Mr. LEWIS. This is only those two years.

The WITNESS. No; I think there is another yet in there; two, isn't there? I think '19 is included, and I think '20 is included.

Mr. ZANE. Disregard 1919.

Mr. LEWIS. You offer the report and that part of the letter relating to 1917 and 1918?

Mr. ZANE. 1917 and 1918. I didn't know there was 1919 in there. Please mark this "Plaintiff's Exhibit L."

(Said document so offered and admitted in evidence was marked "Plaintiff's Exhibit L.")

Mr. LEWIS. This is a report just like the other one, and it is, of course, I suppose, admitted?

The COURT. Admitted for the same purpose.

Mr. LEWIS. Admitted for the same purpose.

Mr. ZANE. We next offer the undated——

The COURT. It is not offered as binding on the commissioner. It is just offered to make understandable the other proof.

Mr. LEWIS. That does not make a particle of difference.

Mr. ZANE. But you cannot get at the figures unless you have these in evidence.

Mr. LEWIS. His contention is that the commissioner's figures are wrong.

The COURT. Your point is, it is upon an entirely different theory. The court will not invalidate the result merely because of that if it could be sustained on any theory.

Mr. LEWIS. No; the position I am taking is this: Mr. Zane does not contend that the result is incorrect, if the commissioner's method is correct. He is not attacking the result if the method is
41 correct. He says that some other method should be applied. Now, if the purpose of these exhibits is to show that the commissioner made a mistake in applying his own method, then I am objecting.

Mr. ZANE. We next offer in evidence the undated letter of the commissioner and the statement therein enclosed which has a certificate, denominated a certificate of overassessment.

Mr. LEWIS. What year is that, 1917?

Mr. ZANE. 1917, yes. And we ask the reporter to have that marked "Plaintiff's Exhibit M."

(Said document so offered was admitted in evidence, marked "Plaintiff's Exhibit M.").

Mr. ZANE. Q. Now, this last document, plaintiff's Exhibit M, is the one that was paid, was it?

A. That was the one that was——

Q. Paid for 1917?

A. Yes.

Q. Now, have you——

A. Letter of overassessment for the year 1918 with statement.

Q. Is the check for both years? Does the check include both?

A. No; they were paid separately.

Q. Well, the, I will introduce now the check on 1917. Have you the check Mrs. Spalding paid?

A. I have the check of Gardner & Carton, paid on her directions.

Q. Paid on her direction, and this is the document that paid the Government?

A. That is the cancelled check.

Mr. ZANE. We offer this check in evidence, being a check for the sum of $39,480.22.

The WITNESS. That check includes interest as well as the assessment.

Mr. LEWIS. That is the payment of this $33,487.09 assessment?

The WITNESS. Yes.

Mr. ZANE. And the rest of it is interest?

The WITNESS. The rest of that check is interest. Mr. Reporter, please mark that "Plaintiff's Exhibit N" and we offer it in evidence.

(Said document so offered was admitted in evidence, marked "Plaintiff's Exhibit N.")

Mr. ZANE. Q. Now, as to the year 1918, all the documents that have been offered except one refer to 1917?

42 A. No; that is not quite correct. Some of these documents include the year 1917 and 1918 in the report.

Q. Well, only one, I think, so far as I know, but if there are more, they will show. Have you any of the preliminary documents regarding 1918?

A. There is a letter of November 10, 1920, covering the year 1918, the tax for the year 1918.

Mr. ZANE. Yes. We offer this letter in evidence, dated November 10, 1920.

(Said document so offered was admitted in evidence marked "Plaintiff's Exhibit O.")

Mr. ZANE. Q. Now, the next document applying to 1918 is the certificate of overpayment?

A. That is right.

Mr. ZANE. We offer this document, signed by the deputy commissioner, called a certificate of overassessment, and as to have it marked "Plaintiff's Exhibit P."

(Said document so offered was admitted in evidence, marked "Plaintiff's Exhibit P.")

Mr. ZANE. Q. Now, have you produced the check that paid for that offered document, that $85,502?

A. Yes; the check which I have just handed you is the check paid for the year 1918, 1918 taxes, plus interest from date.

Q. Yes. The amount is $80,136.75 plus interest, making a total of $85,502.71?

A. I believe that is correct.

Mr. ZANE. We offer this check in evidence and ask to have it marked "Plaintiff's Exhibit Q."

(Said document so offered was admitted in evidence, marked "Plaintiff's Exhibit Q.")

Q. I show you photostatic copies and ask you if those are photostatic copies of the claim filed by you for refund of Mrs. Spalding's tax?

A. They are—1917 and 1918.

Mr. ZANE. We will ask to have the one for the year 1917 marked "Plaintiff's Exhibit R" and we offer it in evidence, and the claim for refund, "Plaintiff's Exhibit S," for the year 1918, we offer in evidence.

(Said documents so offered were admitted in evidence, marked "Plaintiff's Exhibits R and S," respectively.)

Mr. ZANE. Q. Now, have you the letter in regard to your objection?

We offer the letter of May 12, 1926, being the rejection of the
43 claim for refund for the year 1917 in evidence as plaintiff's "Exhibit T and the letter of May 12, 1926, rejection of the claim for refund of the year 1918 in evidence as plaintiff's Exhibit U.

(Said documents so offered and admitted in evidence, were marked "Plaintiff's Exhibits T and U," respectively.)

WITNESS. I have figured out for the year 1917 the amount of the tax that would be payable by Mrs. Spalding on our theory of the way to take the depletion. I have taken into account the figures as reported and as fixed by the Government in its various reports and as to which we have had no dispute. Then I have taken depletion on the method which we have claimed and have figured, or attempted to figure, the tax, taking that as the proper figure. I believe that that makes only one other figure to be changed, which is a matter of donations. The reason for that is that under the law Mrs. Spalding is entitled to fifteen per cent maximum of her income, a credit of fifteen per cent of her total income for her donations, and that makes a difference in her return, because if she is entitled to a greater depletion she is entitled to less credit for donations than the Government would allow her. I figured that in that way. The law allowed only fifteen per cent of your income as donations. If you made more donations than fifteen per cent you could not get them deducted. On the Government plan of figuring, her fifteen per cent of her income was less than her donations. She is entitled, under the Government plan, to more donations than she is under our plan. That is the difference in that figure. Otherwise, the computations take the same figures that the Government has taken, except as to depletion.

In figuring how much would be interest on the deferred payments from March 1, 1913, and how much would remain as capital, I took each payment on the date when it was paid, say a payment on January 10, 1917, and I had that discounted back to March 1, 1913, in order to figure just what sum of money discounted at five per cent over the intervening period from March 1, 1913, up to date of payment would produce. That is simple interest. I took the payment and by calculation divided it into two parts, one part of it being the amount of money which put at simple interest on March 1, 1913, with that simple interest added to that amount of money would amount to the payment made in 1917 or 1918. I did that on each quarterly payment. I made the same kind of a calculation for the year 1918.

All the corrections and everything are taken into account of
44 there and the depletion figure was taken on the same plan as I have stated.

Mr. ZANE. Now, these are matters of calculation, your honor, and we offer them simply as calculations, subject to their calculating the same thing. It is the same thing. We can not differ.

Now, we offer these calculations in evidence, the one for 1917 as plaintiff's Exhibit V, and the one for 1918 as plaintiff's Exhibit W.

Mr. LEWIS. I object to them. I understand they were admitted, subject to check.

Mr. ZANE. Yes.

Mr. LEWIS. I object to them on the ground that the method therein used to calculate depletion allowance is incorrect.

The COURT. That is the whole case. Overruled.

Mr. ZANE. That is the whole case.

Mr. LEWIS. Exception.

(Said documents so offered and admitted in evidence were marked as "Plaintiff's Exhibits V and W," respectively.)

The COURT. There is one question here I want to ask you. Count 1 being the tax of 1917, is it not? Count 1 is 1917?

Mr. ZANE. Yes, sir.

The COURT. On page 5, near the bottom of the page, depletion in 1917. The second count deals with the taxes for 1918, does it not? Now, turn to page 17, top of the page.

Mr. ZANE. Well, that is what we allege to show their method.

The COURT. No; depletion in 1917. In other words, you have got there the computation of the depletion for 1917 in the 1918 count. I am calling your attention to it because I was checking through.

The WITNESS. It should be amended, your honor, to show that.

The COURT. It was a mistake.

The WITNESS. Yes; it was simply to show the method, and that 1917 was put in through error.

The COURT. $20,094.22 is erroneous in the second count.

The WITNESS. Yes.

The COURT. It should be amended.

Mr. ZANE. Yes.

The COURT. On the face.

Mr. LEWIS. I have no objection to the amendment except——

The COURT. That is to say, they put their computation for depletion for 1917 in the 1918 column.

Mr. ZANE. That is it, exactly.

45 The COURT. It has no place there.

Mr. ZANE. No; we ought to have put in the figures for 1918.

Mr. LEWIS. I have no objection.

Mr. ZANE. We will amend it right on the face.

The COURT. Leave given to amend second count on its face by striking out the amount $19,194.92 for 1917 and substituting therefor—now, give the——

Mr. LEWIS. Strike out the tonnage, too.

The COURT. No; I think we will simply say, leave to amend second count on its face. There will be no question about it.

Mr. GREEN. If the court please, while we are on this amending process here, on page 2 of the declaration——

The COURT. Another thing, Mr. Green has called attention to, page 2 of the declaration they have included tract No. 7.

Mr. GREEN. I just spoke to Mr. Gardner about it. Tract No. 7 is not involved in this suit other than just expressed in the declaration.

Mr. ZANE. It was under lease.

The COURT. But they offered no proof. I think it does no harm. It is in the declaration, but they have no evidence about it.

Mr. GREEN. The only thing is, it might confuse. I would like to have it stricken out.

Mr. ZANE. We do not care anything about tract 7.

The COURT. It simply means amend the declaration on its face. Now, you agree?

Mr. ZANE. Yes.

Mr. GREEN. Well, the change will simply be——

The COURT. Strike out tract 7.

Mr. GREEN. Strike No. 7.

The COURT. And substitute that figure that I have indicated.

WILLIAM A. JENKINS, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct examination by Mr. ZANE:

Reside at 7243 Bennett Avenue, Chicago, Illinois. My vocation is that of consulting actuary.

Q. Have you made any calculations upon certain sums of money?

46 A. Yes, sir.

Q. Wait; just let me get through. Paid quarterly in the years 1917 and 1918, to ascertain, if those are deferred payments from March 1, 1913, how much of the payment made at the date of the quarter you have would be a principal sum, which put out at interest at five per cent for the period of deferment, would with the interest amount to the amount of the payment?

A. Yes, sir.

Q. And have you the paper there showing your calculations?

A. Yes, sir; I have.

Q. Those initials that are marked on there, are those your initials?

A. They are my initials.

Q. That is the way you identify the paper?

A. Yes, sir.

Mr. ZANE. Please mark this paper for identification at present "Plaintiff's Exhibit X," for identification.

Q. Now, are you able to say that those calculations are correct?

A. They are correct.

Q. I wish you would take that paper and state what the calcula tion is and what it shows.

Mr. LEWIS. We object on the ground it is immaterial in this cas what the discount is.

The COURT. Overruled.

Mr. LEWIS. Save our exception on that.

(To which ruling of the court the defendant, by her counsel, the and there duly excepted.)

The WITNESS. Shall I answer it?

Mr. ZANE. Yes; answer now.

A. The paper gives eight calculations. Each one gives an amoun which placed at interest, simple interest at the rate of five per cent produces an accumulated amount on a certain date in 1917 or '18 Those dates are specified and the amount are specified opposite th date.

Q. That is all specified in the paper?

A. Yes, sir; it is all there.

Q. Now, drawing your attention to a particular statement, you first calculation is stated to be here present value March 1, 1913— that is to say, the sum which placed at interest on that date at th rate of five per cent per annum simple interest will produce a
47 accumlated sum on the later date specified. Now, the amoun you have is $69,351.05. That is the calculated amount.

A. The calculated amount.

Q. And the simple interest which you take is for three year and 315 days. What time is that?

A. That is the time between March 1, 1913, and date specified just below that, I don't recall.

Q. January 19, 1917.

Mr. LEWIS. This is all going in subject to objection.

A. Between March 1, 1913, and January 19, 1917.

Mr. ZANE. Q. That is the period elapsed, so that the sum is fo the three years $10,387.65 and $2,988.23 for the 315 days. Now, yo add that interest together and the principal sum at the top, and w have the accumulated sum paid, royalty paid of January 19, 191 $82,626.93.

A. That is correct.

Q. It is just the same for every other payment?

A. Yes; it is.

Q. And you got the amounts of the payment and the dates o payment, they were supplied to you as the basis of the calculation

A. They were supplied to me for the basis of the calculation.

Mr. ZANE. I am going to offer that in evidence.

Mr. LEWIS. We object to it.

Mr. ZANE. We offer Plaintiff's Exhibit X in evidence.

Mr. LEWIS. Of course, I understand that all of the examinatio of this witness with reference to that paper was admitted subjec to objection.

The COURT. Yes.

(Said document, so offered and received in evidence, was marked "Plaintiff's Exhibit X.")

(To which ruling of the court the defendant, by her counsel, then and there duly excepted.)

Mr. ZANE. Cross-examine.

Mr. LEWIS. I move to strike out the testimony given by this witness on the ground that it is immaterial.

The COURT. Overruled.

Mr. LEWIS. Note our exception.

(To which ruling of the court the defendant, by her counsel, then and there duly excepted.)

Mr. ZANE. Any questions?

Mr. LEWIS. No; I haven't anything.

Mr. ZANE. That is all, Mr. Jenkins.

48 Mr. LEWIS. Just one moment. You said the interest rate was five per cent, simple interest, didn't you?

A. Yes, sir.

Mr. ZANE. That is what it says on the paper.

Mr. LEWIS. That is all.

(The plaintiff here rested.)

And thereupon the defendant, to maintain the issues upon her part, introduced the following evidence, to wit:

WILLIAM H. CRAGO, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination by Mr. LEWIS:

Am forty-eight years of age and my occupation is that of consulting mining engineer and geologist. Live at Duluth, Minnesota. I was three years assistant mining engineer and chemist for the Oliver Iron Mining Company, a subsidiary of the Steel Corporation, at Norway, Michigan. Was three years mining engineer for the same company at Iron River, Michigan. For ten years I was engineer in charge of explorations for the same company with headquarters at Duluth, Minnesota. For about four years I was director of explorations for the Union Miniere du Haut Katenga in the Belgian Congo, Africa. For one year I was consulting mining engineer for the Japanese Imperial Government at iron mines at Anshan, Manchuria; coal mines at Fushun, Manuchuria; six years, bringing my experience up to the present date, I have been general consulting mining engineer in various mines in the United States and Canada.

Mr. LEWIS. Q. In the mining industry, what method is customarily used in providing for depletion, depletion reserves, capital expenditures, such as stripping charges, for amortization of bond issues?

Mr. ZANE. If your honor please, we object to that as wholly irrelevant and immaterial. He says for the amortization of bond issues. That hasn't got anything to do with this.

The COURT. No; that has nothing to do with this.

Mr. LEWIS. This is a return of the capital account, your honor.

The COURT. What is the purpose of this?

49 Mr. LEWIS. It doesn't make any difference whether it is amortization of bond issues or return of invested capital, that is it.

The COURT. Answer the question.

A. Capital is returned at the same rate——

Mr. ZANE. Now, speak louder, won't you?

A. I say the capital is returned at the same rate as the material is taken out of the ground and in step with that extraction.

Mr. ZANE. Please let me have that read.

(Answer read.)

Mr. ZANE. Why, of course, they couldn't pay off anything unless they took something out of the ground; is that what he means?

The COURT. I understand so.

Mr. ZANE. I move to strike out his answer as having nothing to do with this case.

The COURT. Overruled.

Mr. LEWIS. Q. Can a reasonable allowance for the depletion of mining property be determined by discounting the amount received from that, from the operation of that property in a given year at five per cent simple interest back to the basic date—that is, the date on which the capital investment was made?

Mr. ZANE. Now, just read that part. Did he say depreciation or depletion?

(Question read.)

Mr. ZANE. Now, we object to that, because it involves the whole law question here. It involves a conclusion of reasonable allowance.

The COURT. That objection is sustained.

Mr. LEWIS. Note an exception.

(To which ruling of the court the defendant, by her counsel, then and there duly excepted.)

Q. In your opinion, Mr. Crago, can a reasonable allowance for the depletion of a mining property be determined by discounting the amount received from the operation of that property in any year?

Mr. ZANE. We object to that as incompetent, irrelevant, and immaterial and stating a conclusion.

The COURT. Did you finish your question?

Mr. LEWIS. I had not.

Mr. ZANE. Oh, I beg your pardon.

The COURT. Start over again and put your question.

50 Mr. LEWIS. Q. In your opinion, Mr. Crago, can a reasonable allowance for the depletion of a mining property be determined by discounting the receipts from the operation of that property in any year at five per cent simple interest from the date of receipt back to the basic date—that is, to the date the investment was made?

Mr. ZANE. We object. He is asking his opinion upon a matter that is not a matter for opinion evidence, because it is a legal question.

The COURT. Objection sustained.

Mr. LEWIS. Note our exception.

(To which ruling of the court the defendant, by her counsel, then and there duly excepted.)

Mr. LEWIS. That is all. Wait a second.

Q. Mr. Crago, what is the customary method in the mining industry of determining depletion alone?

Mr. ZANE. We object to that as irrelevant and immaterial. We have got a question here——

The COURT. Supposing the tax involved in this case was already determined in accordance with the rules and regulations made by the Commissioner of Internal Revenue, I can not see how the opinion of this witness as to what is a reasonable allowance for depletion can be competent.

Mr. LEWIS. The only bearing it would have——

The COURT. We have the regulation made by the Commissioner of Internal Revenue, and that has provided a method for determining what is a reasonable allowance for depletion. Certainly that depletion could not be determined by the United States in any other way than the one provided by the Commissioner of Internal Revenue, even though in the end it might be held that that commissioner was arbitrary or unreasonable, but certainly you can not get from this witness what is the reasonable—and the further objection to the questions is that they are general in their form, the witness is not asked to have in contemplation the fact that depletion is for the purpose of the application of the statute in this case, but he is asked the question, on the contrary, as a question of bookkeeping with reference to amounts, and in my opinion it is clearly incompetent.

Mr. LEWIS. Note our exception.

(To which ruling of the court the defendant, by her counsel then and there duly excepted.)

Mr. LEWIS. I would like to offer to prove by this witness
51 that the custom in the mining industry in regard to setting up depletion reserve and providing for depletion, both in respect to lessor's interest in mines and operating owners and lessees in mines, is to set aside each year a proportionate part of the March 1, 1913, value of the interest, which proportion is properly—which is the same proportion as is the proportion of the physical body extracted to the total estimated content in mineral body.

The COURT. Let me ask you a question.

Mr. LEWIS. Yes, sir.

The COURT. Do I understand you? You are relying on section 210 of Regulation 45, which provides that the value of the property [reading section].

Now, then, how would a custom by which a fixed amount shall be set aside each year for depletion have any place in a case where the Commissioner of Internal Revenue has provided, as I understand the regulation, that the depletion is to be determined with reference to the units sold within the taxable year.

Mr. LEWIS. The method in this case is exactly in accordance with the regulation; this taxpayer is contending——

The COURT. Then why is it necessary to have expert testimony? You are really asking this witness here to prove some kind of a custom which Congress has not settled. It says it shall be done in accordance not with the custom, but it is already done in accordance with the regulations of the Commissioner of Internal Revenue, and you are standing on that regulation?

Mr. LEWIS. The taxpayer is contending in this case that the method provided in the regulation is not a reasonable method. That is his contention.

The COURT. I don't know whether he is or not. I think his contention is that you have not properly interpreted and applied the regulation.

Mr. LEWIS. As a matter of fact, he is not. He is contending that the regulation provides an erroneous method, because it is not a reasonable method for determining depletion. I submit that the custom on the industry tends to show the reasonableness or unreasonableness of a proposed method.

The COURT. Well, I think I will do this. I think while we have this witness on the stand I will take his answer and let Mr. Zane move to strike it out, or I will reserve the ruling on that until the finish of the case. You may reframe your question and let
52 him go ahead and testify all about this custom so we can get it in the record in his own language; then I will let it stand on a motion to strike until the evidence is completed. That applies to these other questions to which I sustained the objection. You may cover that ground and let him tell what the custom is, without——

Mr. LEWIS. Well, I will just ask him that question.

The COURT. What is the custom? Your question, I understand, is this, Mr. Lewis. You wish the witness to tell the custom, the general custom in the mining business with reference to determining allowances for depletion.

Mr. LEWIS. That is correct, both in regard to lessees and lessors.

The COURT. Yes.

A. We take the value of the mine as of the basic date.

Mr. ZANE. I don't hear you, please.

A. I can't talk any louder, Mr. Zane.

The COURT. And in this case would be March 1, 1913.

Mr. LEWIS. That is correct.

A. And the tonnage of ore in the mine as of that date, we divide the value by the tonnage to get a factor to be used for depletion; then in any one year the number of tons extracted in that year times the factor gives us the amount of the depletion for that year.

The COURT. Now, in applying that, there are two things you have to determine; you have to arrive at a figure which represents the value of the mine?

A. Yes, sir.

Q. And you have to arrive at a figure which represents the tonnage of the mine?

A. Yes, sir.

Q. And your answer is based upon the assumption that the figure has been arrived at as to the value of the mine?

A. Yes, sir.

Q. And also that a figure has been arrived at as to the tonnage?

A. Yes, sir.

Q. And you do not intend to include in your answer anything with reference to the method to be used to determine the value of the mine?

A. Not in the answer to this question.

Q. Nor to the method which is to be used in arriving at the tonnage of the mine?

A. Not in the answer to this question.

53 Mr. LEWIS. Q. But you do say that without the value of the owner's interests, as of the basic dates, which in this case is March 1, 1913, and without an estimate of the ore reserve, a proper allowance for depletion cannot be determined in accordance with the custom, the general custom of the mining industry?

A. Yes, sir.

Mr. LEWIS. That is all.

The COURT. And let the record show now—Do you want your motion in to strike that?

Mr. ZANE. Yes, sir; we make the motion.

The COURT. Motion to strike is entered and ruling reserved. Call my attention to it when you are preparing to argue the case.

Cross-examination by Mr. ZANE:

Q. Now, under that rule, if there were two mines side by side taking out iron ore of the same quality at the same time, the unit of depletion or figure per ton for depletion in one mine might differ very much from the figure or unit of depletion in the other mine by its side?

A. Certainly.

Mr. ZANE. That is all.

Redirect examination by Mr. LEWIS:

Q. Well, just a minute. I will ask you just why that is so. I don't think that is proper cross-examination, and want to correct it by permitting him to explain what he means.

The COURT. Just exactly what he said.

Mr. ZANE. That is a fact, and——

The COURT. You desire him to explain it?

Mr. LEWIS. Yes; I would like to have him state just why that is.

A. It seems to me obvious that if we have two mines right alongside of each other, one of them has got a hundred thousand tons in, and one has a million tons in, the amount of the depletion

would necessarily be different, irrespective of the amount that was mined in any one particular year.

Mr. ZANE. That is not the question asked.

Mr. LEWIS. All right, you go ahead and ask him some more then.

54. Mr. ZANE. Yes; that is not the question. The question asked you was whether if you had two mines side by side, and you were figuring on a unit of depletion for each mine, and each of those mines took out the same quantity of ore in a year, and the ore was of the same quality and the same value on the market, nevertheless the amount of depletion in the one mine would differ from the amount of depletion in the other mine.

A. Certainly it would.

The COURT. It might or might not; is not that the correct answer? It might not if the quantity in the mine had been estimated correctly and the difference in the value of the mine had been made to correspond with the difference in quantity, then it would be the same, wouldn't it?

A. It seems to me that the very nature of depletion provides for depleting a certain particular sum of money or ore, whichever you want to call it, that has to be depleted over a certain number of years. Well, if you have a mine in which there are 100,000 tons, we will say, and another mine in which there is a million tons, and then in one year you take out from each mine 100,000 tons, from the first mine you have completely depleted the mine, necessarily you write off all the depletion; on the second mine you have only depleted one-tenth of the reserves; therefore you write off one-tenth of the depletion.

The COURT. Supposing the second mine is worth ten times as much as the first.

A. In that case you write off the full depletion.

Q. And it is the same as one-tenth of the other?

A. Yes, sir.

Mr. ZANE. But the unit of depletion, would that be the same?

A. No.

Mr. LEWIS. Don't you see, your honor, the unit can not be the same unless the factors and the estimates are precisely the same? He can't get the unit of depletion the same; that is the trouble.

Mr. ZANE. Now, let me ask you this: The depletion consists in money or in tons of ore taken out, doesn't it, that is what depletes the mine?

Answer. If you start with tons of ore, then you certainly deplete tons of ore.

Q. Yes.

A. If you start with money, you deplete money.

Q. And have you money or mine there?

55 A. If you start with horses, you deplete horses.

Q. You are mining ore?

A. For which you are getting money.
Q. But you are taking it out.
A. Yes.
Q. And it is the ore taken out that depletes the mine?
A. Yes.
Q. Now, if the two mines are side by side, and the one takes out exactly the same quantity of ore as the other mine, and the ore is of the same quality, and the one mine's depletion in ore is the same as the other mine's depletion in ore, isn't it?
A. It certainly is not.
Mr. ZANE. All right, that is all.
A. It is the same in amount but not the same in rate.
Q. It is the same in ore, isn't it?
A. It is the same in amount, but not the same in rate.
Mr. ZANE. That is all.
A. The same number of tons of ore have been taken out, but not the same proportion of the total ore.
The COURT. Why, certainly not, because in one case he has taken all of it out and the other mine you are taking a tenth of it.
A. Why, certainly, in one year.
Mr. LEWIS. I want to make a motion for a directed verdict for the defendant.
The COURT. Is there a counter motion?
Mr. ZANE. We make the same motion to direct a verdict.
The COURT. And the jury will be excused until ten o'clock next Tuesday morning. I will hear you argue your motions this afternoon. The jury will come back at ten o'clock; at which time I will pass on your motions, and if it is agreeable to you gentlemen I would like to adjourn a few minutes after four. Ten o'clock Tuesday morning.
Mr. LEWIS. If your honor please, I have prepared in writing a motion for this directed verdict which I would like to file.
The COURT. Yes. In which you assign your reasons for it?
Mr. LEWIS. Yes.
The COURT. Give counsel on the other side a copy, and I suppose you will have one also.
Mr. ZANE. Yes, sir. I will file another one in writing.

56 TUESDAY, MAY 8, 1928, 10 O'CLOCK A. M.

Court met pursuant to adjournment.
Present: Mr. Zane; Mr. Green.
The COURT. Bring in the jury in the Spalding case.
Mr. ZANE (handing paper to the court). I might say that amount in there is the agreed amount, your honor. We have both made the calculation so there is no dispute.
(Whereupon the following proceedings took place in the presence and hearing of the jury.)

Instructions to jury

The COURT. In this case, both the plaintiff and defendant have moved for a directed verdict. The effect of such a motion is a submission of the facts to the court for decision. In the case of McHale v. Hull, 14 Fed. Rep., new series, the Court of Appeals for this circuit, passing the technical questions in the case about the form of the bill of exceptions, considered the merits of the case, and held that the finding of the trial court in that case was to be sustained on at least two theories.

It is conceded here at the argument on the trial in this court that the record in the case on trial is for all purposes of this motion, the same record, or, rather, substantially the same record as the record in the case which was decided by the Circuit Court of Appeals for this circuit. Unless, therefore, there is something in the later decisions of the Supreme Court which, when drawn to the attention of the court at the argument, the effect of which is to overrule that decision of the Court of Appeals, it is the duty of this court to follow the decision of the Circuit Court of Appeals for this circuit.

I have examined very carefully this Ludey case in the 274th U. S. While there is some language in that case which might be interpreted to be out of harmony with what the Circuit Court of Appeals in this circuit has said in the McHale case, it is my opinion that there is nothing in the Ludey case which might justify this court in disregarding the plain decision of the Circuit Court of Appeals for this circuit in the McHale case.

I think that the only course which properly can be pursued or may be pursued by the court is to give the directed verdict for the plaintiff in this case.

The jury, therefore, are instructed to find for the plaintiff
57 and to assess the plaintiff's damages at the sum of $118,043.21.

You may retire to your room, gentlemen, and sign the verdict.

Mr. GREEN. If the court please, will you note our exception to that finding.

The COURT. Yes; certainly.

(To which ruling of the court the defendant, by her counsel, then and there duly excepted.)

Mr. ZANE. If your honor please, I think there is one matter that I ought to call to the court's attention. Your honor said when we made our motion to strike out the evidence for the defendant, you said to call the motion to your attention later, but I don't think in the presence of this instruction it makes any difference.

The COURT. The case having been submitted——

Mr. ZANE. There is nothing in that.

The COURT. Practically by a motion for a directed verdict on both sides, it seems to me that these rulings on the admissibility of evidence become unimportant.

Mr. ZANE. Well, I think so, your honor, but I just wanted to bring it up, so as to——

The COURT. Yes.

(Whereupon the jury retired and brought in their verdict as instructed.)

The COURT. You may enter the verdict, Mr. Clerk. The record will show—Is Mr. Green here? The record may show a motion for new trial entered and overruled and exception, judgment on the verdict and exception, and sixty days for a bill of exceptions, I suppose.

Mr. HESS. I don't see either Mr. Green or Mr. Lewis here. I am quite sure they will want to appeal.

The COURT. I will allow sixty days for bill of exceptions.

Mr. HESS. You don't need any order allowing an appeal under the new statute.

The COURT. Appeal is taken by merely filing notice with the clerk, under this new statute.

Mr. HESS. Probably there should be a motion, if the court please, in arrest of judgment and overruled, and motion for new trial made and overruled.

The COURT. Yes.

Mr. HESS. And sixty days for a bill of exceptions.

The COURT. Yes, that will make the record complete.

Which were all the proceedings had and evidence taken on the trial of the above entitled cause.

Order settling bill of exceptions

Be it further remembered and certified that the above and
8 foregoing is a true and correct transcript of all of the evidence heard in this case both on behalf of the plaintiff and the defendant; that the exhibits attached hereto and made a part thereof by reference constitute a true and correct transcript of all of the exhibits introduced in evidence necessary to present clearly the questions of law involved in the rulings to which exceptions were reserved, and it is a true and correct transcript of all of the exceptions and objections made both by the plaintiff and the defendant to the introduction of evidence, and a true and correct transcript of the rulings of the court. And, inasmuch as the matters above set forth do not fully appear of record in this suit, the defendant tenders this bill of exceptions and prays that the same may be certified under the hand and seal of the judge of this

court and, accordingly, made a part of the record of such cause, and it is accordingly done this 13th day of July, A. D. 1928.

JAMES H. WILKERSON,
Judge of the District Court of the United States,
Northern District of Illinois, Eastern Division.

Presented to us this 22d day of June, 1928.

ZANE, MORSE & NORMAN,
GARDNER AND CARTON,
Attorneys for Plaintiff.

Presented to me in open court this 13th day of July, A. D. 1928.

We approve the above and foregoing bill of exceptions.

ZANE, MORSE & NORMAN,
JOHN M. ZANE,
GARDNER & CARTON,
HENRY A. GARDNER,
URBAN A. LAVERY,
ALFRED T. CARTON,
Attorneys for Plaintiff,
Eudora Hull Spalding.

FOLD OUT IS TOO LARGE TO BE FILMED

(SEE INSTRUCTIONS ON PAGE 3 UNDER CORRESPONDING HEADINGS)

DETAILS OF TAXABLE INCOME

WRITE "NONE" IN EACH BLOCK IN WHICH YOU HAVE NO I

A. INCOME FROM SALARIES, WAGES, COMMISSIONS, BONUSES, DIRECTORS' FEES, AND PENSIONS, A

1. By whom received	2. Occupation or profession	3. Name and address of employer or (if practicing a profession) office address	
None			

Net Income from Salaries, etc. (total column 4 minus total column 5) ____

Explanation of deductions: ____

B. INCOME FROM BUSINESS (INCLUDING FARMING)

Kind of business None — Business address ____

Gross Sales and income from business services ____

Cost or Goods Sold:

Labor			
Materials and supplies			
Merchandise bought for sale			
Other costs			
Plus inventories at beginning of year			
Total			
Less inventories at end of year			
Net Cost of Goods Sold			

Other Business Deductions:

- Salaries and wages not reported as "Cost of Goods Sold" ____
- Rent ____
- Interest on business indebtedness ____
- Taxes on business and business property ____
- Repairs, wear and tear, and property lo... (To be explained in table at bottom of page.) ____
- Bad debts arising from sales (see instruc... ____
- Other expenses (specify) ____
- Total Other Business Deductions ____

Net Cost of Goods Sold Plus Total Other Business Deductions ____

Net Income from Business (including Farming) ____

Explanations: ____

C. PROFITS FROM SALE OF REAL ESTATE, STOCKS, BONDS, AND OTHER PROPERTY.

1. Kind of property.	2. Year acquired.	3. Name and address of purchaser or broker.	4. Sale price.
None			

Net Profit from Sales (total of columns 4 and 7 minus total of columns 5 and 6) ____

Explanations: ____

D. INCOME FROM RENTS AND ROYALTIES.

1. Kind of property.	2. Name and address of tenant or lessee.	3. Amount of rent and royalties.	4. Expenses (repair, wear and tear, real property taxes)
Iron mines		260 072 30	260 072
Totals			

Net Income from Rents and Royalties (total of column 3 minus total of columns 4, 5, 6, and 7) ____

Explanations: ____

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1917

Page 4

DETAILS OF TAXABLE INCOME (Concluded)

(SEE INSTRUCTIONS ON PAGE 8 UNDER CORRESPONDING HEADINGS)

TOTAL NET INCOME from Sources A, B, C, D, E, and F, reported on page 3							15	572	64
G. INTEREST ON TAX-FREE-COVENANT BONDS (on which one normal tax of 2 per cent was withheld at source).	1. Gross income.			2. Deductions, if any.					
	6	731	34						
NET INTEREST ON TAX-FREE-COVENANT BONDS (total column 1 minus total column 2)							6	731	34
H. OTHER INCOME (including income from partnerships and fiduciaries, except that reported under E, F, and G).	1. Gross income.			2. Deductions, if any.					
Interest on bonds and other obligations of domestic and resident corporations (except as entered under G)	5	291	37				5	291	37
Interest on bonds of foreign countries and corporations and dividends on stock of foreign corporations									
Interest on notes, bank deposits, mortgages (except of corporations), and all other interest	9	117	98				9	117	98
I. TOTAL NET INCOME FROM ALL SOURCES							36	572	32
J. GENERAL DEDUCTIONS NOT REPORTED ON PAGE 3 OR ABOVE (EXCEPT CONTRIBUTIONS—SEE N BELOW).									
Interest on personal indebtedness									
Taxes on dwelling and personal property, and other taxes not reported above (see instructions on page 8)						1	417	78	
Other deductions, except contributions (explain) Expense of maintaining residence, Salaries, Legal expenses						5	016	81	
TOTAL GENERAL DEDUCTIONS, EXCEPT CONTRIBUTIONS							6	434	59
K. TOTAL NET INCOME (WITHOUT DEDUCTING EXCESS PROFITS TAXES OR CONTRIBUTIONS)							30	138	73
L. LESS EXCESS PROFITS TAXES, IF ANY, FOR 1917 (see instructions on page 1 under "Excess profits taxes")									
M. TOTAL NET INCOME (WITHOUT DEDUCTING CONTRIBUTIONS) (K minus L)									
N. CONTRIBUTIONS TO CHARITABLE ORGANIZATIONS, ETC. (Enter below name and address of each organization and amount paid to each.)									
Chicago Art Institute, Exposition &c	6	000							
Visiting Nurse Assn, Chicago, Illinois	1	200							
Red Cross Fund for Europe Wounded	15	000							
TOTAL (not over 15 per cent of item M)							1	523	01
O. TOTAL NET INCOME ON WHICH INCOME TAX IS TO BE COMPUTED (M minus N)							25	614	72

CAUTION

Read all instructions.

Answer all questions.

If necessary, ask your Collector of Internal Revenue for assistance.

Form 1040 (Revised January, 1918)—UNITED STATES INTERNAL REVENUE.

INDIVIDUAL INCOME TAX RETURN FOR CALENDAR YEAR 1917

(Write plainly. Give name in full.)

Name by (or for) Eudora Hull Spalding

Home address 2626 Prairie Avenue, Chicago, Illinois

(Street and number or rural route.) (Post office and State.)

(IF NAME AND ADDRESS ARE FILLED IN AND EITHER IS INCORRECT, PLEASE CORRECT IT.)

FEB 2 1918

RECEIVED

Assessed by

Entered on list

Page Line

07264 0 3 4 3

1. Did you make a return for 1916? Yes 2. If so, at what address did you give on the return? 2626 Prairie Avenue, Chicago Illinois 3. To what Collector's office was it sent? 1st Illinois (Give district or city and State.)

4. Were you on December 31, 1917, married and living with wife (or husband)? Yes 5. If not, were you head of a family as defined in instructions on page 1 under "Personal Exemption"? 6. How many dependent children under 18 (or mentally or physically incapacitated for self-support) had you on December 31, 1917?

7. If head of a family without dependent children, what was the relationship of those dependent upon you? 8. Did your wife (or husband) or dependent children derive income from sources independent of yours? Yes 9. If so, in what amount, for each person?

10. If not, was such income from a separate estate? 11. If a separate return has been made by (or for) wife (or husband) or dependent child, give full name and address entered at head of that return. Nelle Spalding 2626 Prairie Avenue Chicago Illinois

12. If income of $800 or more received by wife (or husband) or dependent child is included in this return, give full name of each such person, and also address if different from that given at the head of this return.

13. What addresses other than those already entered on this return did you give to employers or other persons, firms or corporations who paid you $800 or more income during 1917?

14. Is this return made from books kept on other than a cash basis? 15. If so, were such books audited by a public accountant? 16. By whom?

17. To the best of your knowledge and belief, is the statement on this account-ant's report?

18. Total net income on which tax is computed (item O)	25	614	72	28. Normal tax at 2 per cent on amount of item 25		492	29
19. Less: Excess of dividends received from obligations of United States issued since Sept. 2, 1917 (item 2, total of column 7)	5	572	64	29. Additional normal tax of 1 per cent on amount of item 27		492	29
				30. Total normal tax		984	58

DETAILS OF TAX-FREE INCOME (Continued)

Total Net Income from Schedule B, Col. B, Line 3 (Carried on Page 2)

6. INTEREST ON TAX-FREE-COVENANT BONDS (Including that portion of 4% per cent which was withheld at source)

Net Interest on Tax-Free-Covenant Bonds (Enter total on Line 7, Page 2)

7. OTHER INCOME (Including income from partnerships) and from estates and trusts (Attach a separate sheet if required under C)

Interest on bonds and other obligations of domestic and municipal corporations (except as entered under 6)

Interest on bonds of foreign countries and corporations and dividends on stock of foreign corporations

Interest on notes, bank deposits, mortgages (except of corporations) and all other sources

1. TOTAL NET INCOME FROM ALL SOURCES

2. GENERAL DEDUCTIONS NOT ENTERED ON PAGE 3 OR ABOVE (EXCEPT CONTRIBUTIONS—SEE

Interest on personal indebtedness

Taxes on dwelling and personal property, and other taxes not reported above (Enter total on Line 8, Page 3)

Other deductions, except contributions (explain fully) [illegible]

Total General Deductions, Except Contributions

3. TOTAL NET INCOME (WITHOUT DEDUCTING CONTRIBUTIONS) (3 minus 2)

4. LESS EXCESS PROFITS TAXES, IF ANY, FOR 1917 (see instructions on page 1 under "Excess profits taxes")

5. TOTAL NET INCOME (WITHOUT DEDUCTING CONTRIBUTIONS) (3 minus 4)

6. CONTRIBUTIONS TO CHARITABLE ORGANIZATIONS, ETC. (Enter below name and address of each organ

[illegible] $ [illegible]

[illegible] [illegible]

[illegible] [illegible]

Total (not over 15 per cent of 5)

7. TOTAL NET INCOME ON WHICH INCOME TAX IS TO BE COMPUTED (6 minus 7)

CAUTION

INDIVIDUAL INCOME-TAX RETURN FOR CALEN

Make by (or for)

Number of Return [illegible]

Page 4

63 1917

Page 1.

[Form 1040 F, United States Internal Revenue Service]

SCHEDULE OF FARM INCOME
AND EXPENSES FOR THE
YEAR 1917

Rancho Lespe (Eudora Hull Spalding, owner)

(Name)

Lespe, California

(Post office and State)

Attach this form to your income tax return Form 1040A or 1040 and file it with the collector of internal revenue.

If your accounts are kept on a cash receipt and disbursement basis, fill in pages 1 and 3 only. If you keep books of income and expenses on an accrual basis, fill in pages 2 and 3 instead.

FARM INCOME FOR TAXABLE PERIOD

1. Sale of live stock raised on and products from your farm

Kind of animals	Quantity	Amount
Cows		$
Calves		
Bulls		
Steers		
Horses		
Mules		
Colts		
Sheep		
Lambs		
Hogs		
Pigs		
Chickens		
Turkeys		
Ducks		
Bees		
Milk		
Butter		
Cream		
Eggs		
64 Wool		
Hides		
Honey		
Total		$

(Enter on line 1)

2. Sale of crops and products grown on your farm

Kind of crop	Quantity	Amount
Corn		$
Wheat		
Cotton		
Tobacco		
Lemons boxes	19,065	63,644.58
Oranges do	3,378	3,994.25
Beans pounds	788,900	32,565.50
Nursery trees	13,496	10,122.20
Walnuts pounds	28,887	4,825.46
Cottonseed		
Sirup		
Total		$115,151.99

(Enter on line 2)

65 *3. Other receipts*

Items	Amount
Merchandise rec'd for produce	$
Machine work	
Hire of teams	
Breeding fees	
Total	$

(Enter on line 3)

4. Sale of livestock, crops, or other items purchased

Description	Received	Cost	Profit
	$	$	$
Total			$

(Enter on line 4)

Summary of income and expenses computed on a cash receipt and disbursement basis

1. Sale of livestock and stock products raised	$	7. Expenses (column 1, page 3)	$80,720.54
2. Sale of crops and crop products grown	115,151.99	8. Expenses (column 2, page 3)	24,859.20
3. Other receipts		9. Repairs	
4. Sale of stock, or other items purchased		10. Depreciation	11,899.85
5. Gross profits	$115,151.99	11. Total expenses	$117,479.59

6. Net farm loss to be reported in Schedule A, line 21, Form 1040A, or line 22, Form 1040 (item 5 minus item 11) $2,327.60

38 Page 2. *Farm inventory for income computed on an accrual basis*

Description (kind of animals, crops, or other products)	On hand at beginning of year		Purchased during year		Raised during year		Consumed or lost during year		Sold during year		On hand at end of year	
	Quantity	Inventory value	Quantity	Amount paid	Quantity	Inventory value	Quantity	Inventory value	Quantity	Amount received	Quantity	Inventory value
		$		$		$		$		$		$
Totals		$		$		$		$		$		$

(Enter on line 4) (Enter on line 5) (Enter on line 2) (Enter on line 1)

37 *Summary of income and expenses computed on an accrual basis*

1.	Inventory of livestock, crops, and products at end of year	$
2.	Sales of livestock, crops, and products during year	
2a.	Other miscellaneous receipts	
3.	Total	$
4.	Inventory of livestock, crops, and products at beginning of year	$
5.	Cost of livestock, and products purchased during year	
6.	Gross profits (item 3 minus the sum of items 4 and 5)	$
7.	Expenses (column 1, page 3)	$
8.	Expenses (column 2, page 3)	
9.	Repairs	
10.	Depreciation	
	Total expenses	$
11.	Net farm profit to be reported in Schedule A, line 21, Form 1040 A, or line 22, Form 1040 (item 6 minus item 11)	$

Page 3

Farm expenses for taxable period

Items	(1) Amount
Hired help for farm	$58,404.53
Feed, hay, straw, etc	2,353.67
Seed, plants, etc	
Threshing and baling	1,285.50
Cotton ginning	
Silo filling	
Milling and grinding feed	
Fertilizers and spraying materials	6,539.39
Blacksmithing	
Fuel and oil for farm work	6,841.93
Barrels, bags, crates, and twine	
Taxes (except Federal income taxes)	4,969.21
68 Insurance on property other than you dwelling and personal effects	
Interest on farm notes and mortgages	276.31
Water rent	
Rent for farm railroad right of way cultivation lease	50.00
Total	$80,720.54
	(Enter on line 7)

Items	(2) Amount
Misc. supplies for barn	$1,089.93
" " " boarding house	4,875.93
" " " packing house	5,891.41
" " " pumping plant	345.75
" " " tractors	1,584.76
Selling expense assessments of Cal. fruit growers ex	1,871.62
Miscellaneous supplies	9,250.29
Total	$24,859.20
	(Enter on line 8)

Repairs and depreciation

Description (if buildings, state the material of which constructed)	Age when acquired	Date acquired or constructed	Cost, or if acquired prior to March 1, 1913, the fair market value on that date	Repairs	Depreciation
Farm buildings			$50,408.37	$	$2,016.34
Farm machinery and tools			32,147.71		3,796.74
Farm fences, drains, ditches, etc., irrigation system			77,966.26		4,765.15
Furniture & equipment			1,741.00		174.09
Livestock			11,475.31		1,147.83
Totals			$173,738.65		$11,899.85
				(Enter on line 9)	(Enter on line 10)

Remarks:

Page 4

Instructions

Pages 1 and 3 are to be filled in by farmers who either keep no records or only records of cash receipts and disbursements. Pages 2 and 3 are to be filled in by farmers who keep complete accounts on an accrual basis with inventories to determine net profits. Returns on an inventory basis are not acceptable unless the inventories were actually taken and so recorded at the beginning and end of the taxable period.

If you do not, as a matter of settled practice, keep books of account upon an accrual basis, no attempt should be made to fill out the items in the form relating to inventories, and the omission of those items in that case will not result in an incorrect computation of your farm net profit. If, however, you regularly keep books of account upon an accrual basis which clearly reflect your net income, you should report the value of your crops and stock on hand at the end of the year in gross profits, as provided on the form.

This schedule may be used by farmers who work their own farms or rent them out on shares, and if two or more farms are owned, it may be desirable to fill out a separate schedule for each farm.

Attach this schedule to your income-tax return (Form 1040A or Form 1040). You should keep a copy for future reference.

When you have determined the net farm profit, transfer the amount to line 21 in Schedule A of the income-tax return, Form 1040A, or line 22, Form 1040.

Cash receipts and disbursements basis

A farmer reporting on the basis of cash receipts and disbursements shall include in his gross income for the taxable year the amount of cash or the value of merchandise or other property received from the sale of livestock and produce which were raised during the taxable year or prior years, also the profits from the sale of any stock or other items which were purchased. The farm expenses will be the actual amounts paid out during the taxable year.

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Accrual basis

If your farm books of account are kept on an accrual basis, the filing of this form is optional.

For those reporting on the accrual basis, the gross profits are obtained by adding to the inventory value of livestock and products on hand at the end of the year the amount received from the sale of stock and products and other miscellaneous receipts, for hire of teams, machinery, etc., during the year, and deducting from this sum the inventory value of stock and products on hand at the beginning of the year plus the cost of stock and produce purchased during the year. The farm expenses will be the actual expenses incurred during the year, whether paid or not.

Inventory.—If you render a return for the taxable period of 1920 upon an accrual basis, you may value the closing inventory for 1920 according to the farm price method which contemplates valuation of inventories at market less cost of marketing. In the event the use of the farm price method of valuing your closing inventory for 1920 represents a change in method of taking inventories from that employed by you for 1919, the opening inventory for 1920 should be brought in at the same value as the closing inventory for 1919 (this being the same in effect as valuing the opening inventory on the new basis and crediting income with the excess valuation brought in). If such treatment of your opening inventory for 1920 results, however, in abnormally large income for 1920 by reason of the fact that certain stock which was on hand at the beginning is still on hand at the end of the year, then adjustments in the form of an adjustment sheet attached to your 1920 return may be made of your taxes for 1917 and each succeeding year to 1920, based on the new method of taking inventories (using for each of such years prior to 1920 the same method employed for 1920).

Farmers who have kept no records or only records of cash receipts and disbursements and who desire to report on the accrual basis with inventories, must calculate their net income for the current taxable year, without entering as a credit on line 4, page 2, the inventory of livestock, crops, and products at the beginning of the year; except—

(a) If any livestock, grain, or other property on hand at the beginning of the taxable year had been purchased and the cost
71 thereof not charged to expense, only the difference between the cost and the selling price should be reported as income for the year in which sold;

(b) But if the cost of such property has been charged to expense for a previous year, the entire amount received must be reported as income for the year in which sold: Provided, That when actual records or other definite proof satisfactory to the Commissioner of Internal Revenue are available, inventory adjustments may be made in accordance with instructions above.

Income

All the farm income from whatever source must be reported in this schedule. Anything of value received instead of cash must be considered income to the extent of its cash value. Thus the total value of groceries, merchandise, etc., received in exchange for eggs, butter, or other produce must be reported as income.

Hail and fire insurance on growing crops should be included in gross income to the amount received in cash, or equivalent for the crop destroyed.

If you sold your farm or any part of it, report the profit in Schedule D of Form 1040 or 1040.

The value of farm produce which is consumed by the farmer and his family need not be reported as income; but expenses incurred in raising produce thus consumed must not be claimed as deductions.

The term "farm" embraces the farm in the ordinarily accepted sense, and includes stock, dairy, poultry, fruit, and truck farms, also plantations, ranches, and all land used for farming operations. All individuals, partnerships, or corporations that cultivate, operate, or manage farms for gain or profit, either as owners or tenants, are designated farmers. A person cultivating or operating a farm for recreation or pleasure is not regarded as a farmer.

Expenses and other deductions

Labor.—Only that part of the board of hired labor which is purchased should be included as a deduction. The value of products furnished by the farm and used in the board of hired labor is not a deductible expense. Rations purchased and furnished to laborers or share croppers are deductible as a part of the labor expense. Do not deduct the value of your own labor or that of your wife
72 or dependent minor children, unless you report such value as income in Schedule B (Form 1040A or 1040). Do not deduct amounts paid to persons engaged in household work, except to the extent that the services of such employees are used in boarding and otherwise caring for farm laborers. Services of such employees engaged in caring for the farmer's own household are not a deductible expense.

Fertilizers, manures, etc.—The cost of manures, commercial fertilizers, lime, raw rock phosphate, etc., that were bought during the year may be deducted as an expense.

Taxes.—Do not deduct inheritance or estate taxes, Federal income taxes, or taxes for any improvement or betterment tending to increase the value of the property. Be ready to show tax receipts for taxes claimed as a deduction. Do not deduct taxes on your dwelling or household property on this form. They should be claimed in Schedule I, Form 1040A, or Schedule K, Form 1040.

Interest on indebtedness.—All interest paid on farm mortgages, notes, and other obligations incurred to carry on the farm business should be deducted.

Bad debts.—Report only debts, arising from sales that have been reported as income, which have been definitely proved within the year to be worthless. If you report your farm income on a cash basis, bad debts are not an allowable deduction.

Repairs and depreciation.—Depreciation claims should not exceed the actual cost of buildings and equipment (or if acquired prior to March 1, 1913, the fair market value on that date) divided by its probable life in years since acquisition. In computing depreciation do not include the value of farm land nor the land on which farm buildings are located. Do not deduct repairs or depreciation on the

dwelling you occupy or on your personal or household equipment. Do not claim as a separate item depreciation on live stock or any other property included in your inventory, as such depreciation is taken care of in the reduced amount of the inventory at the close of the year. Depreciation, however, may be claimed on draft or work animals and animals held for breeding purposes which were purchased and which are not included in your inventory of stock bought or raised for sale.

Losses.—You may deduct on Form 1040 A or Form 1040 losses of buildings, machinery, and other property not included in your inventory, resulting from fires or other casualties and not compen-
78 sated for by insurance or otherwise. Losses of property included in your inventory are taken care of by the reduced amount of the inventory at the close of the year. The loss of growing crops by frost, storm, flood, or fire or the loss of animals raised, is not deductible.

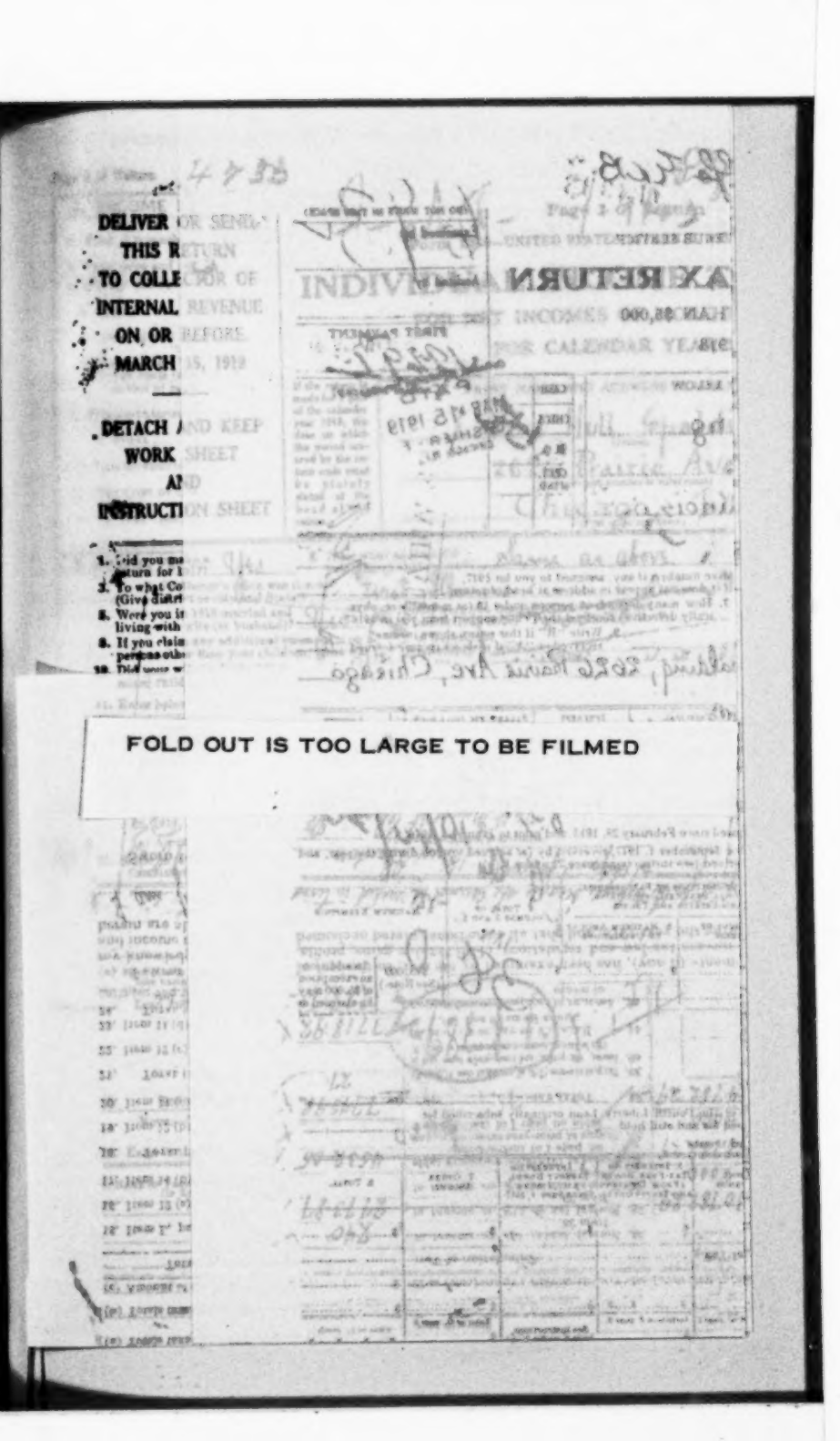
Tools, machinery, and equipment.—The cost of small tools of short life, such as shovels, rakes, etc., may be deducted as an expense. You may deduct expenses of operation, repairs, and depreciation on automobiles used exclusively in farm business. If an automobile is used in farm business for a part of the time only, a corresponding part of the expense may be deducted. Amounts expended for automobiles, farm machinery, farm buildings, or other farm equipment of a permanent nature are not deductible as expenses, as such expenditures are regarded as investment of capital which is returned to the owner through depreciation allowances prorated over the useful life of the property.

Rent paid in crops.—Where a tenant farmer pays his rent to the landlord in form of crops raised on the farm (the agreement being on a crop-share basis), the tenant may not deduct as rent the value of the crop given to the landlord, but he may deduct all amounts paid by him in raising the crop.

79 Explanation of depletion

Referring to "Mines" as shown in Schedule "E." (Explanation of E 4.)

Tax payer has received from lessees of mines during year 1918, $219,940.43, which she has deducted as a depletion of the property consisting of iron mines in St. Louis County, Minnesota, owned by her in fee and leased to Oliver Iron Mining Company and others at a rate of 25c. per ton and valued and reasonably worth March 1, 1913, $7,891,539.38 by the figures of the Minnesota Tax Commission, from which there has been deducted ore at 25c. per ton, yielding to taxpayer since March 1, 1913, $1,084,182.63. b3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EVDORA HULL SPALDING

ersonal or household equipment. epreciation on live stock or any ventory, as such depreciation is nt of the inventory at the close r, may be claimed on draft or r breeding purposes which were ded in your inventory of stock

m 1040 A or Form 1040 losses of perty not included in your inven- other casualties and not compen- herwise. Losses of property in- e taken care of by the reduced of the year. The loss of growing r the loss of animals raised, is not

—The cost of small tools of short be deducted as an expense. You n, repairs, and depreciation on m business. If an automobile is f the time only, a corresponding ed. Amounts expended for auto- dings, or other farm equipment of ible as expenses, as such expendi- f capital which is returned to the nces prorated over the useful life

enant farmer pays his rent to the n the farm (the agreement being may not deduct as rent the value , but he may deduct all amounts

of depletion

in Schedule "E." (Explanation

ssees of mines during year 1918, ed as a depletion of the property uis County, Minnesota, owned by n Mining Company and others at d and reasonably worth March 1, f the Minnesota Tax Commission, cted ore at 25c. per ton, yielding 1,084,182.63. b3

DELIVER OR SEND THIS RETURN TO COLLECTOR OF INTERNAL REVENUE ON OR BEFORE MARCH 15, 1919

DETACH AND KEEP WORK SHEET AND INSTRUCTION SHEET

Form 1040—UNITED STATES INTERNAL REVENUE SERVICE

INDIVIDUAL INCOME TAX RETURN

FOR NET INCOMES OF MORE THAN $5,000

FOR CALENDAR YEAR 1918

If the return is made for a part of the calendar year 1918, the dates on which the period covered by the return ends must be plainly stated at the head of the return.

PRINT NAME AND ADDRESS PLAINLY BELOW

Evdora Hull Spalding
(Name)
2626 Prairie Ave
(Street and number or Rural Route)
Chicago Illinois
(Post office and State)

FIRST PAYMENT

1. Did you make a return for 1917? Yes
2. If so, what address did you give on that return? Same as above
3. To what Collector's office was it sent? (Give District or city and State.) First Illinois
4. Give number if any, assigned to you for 1917, if it does not appear in address at head of return
5. Were you in 1918 married and living with wife (or husband)? Yes
6. If not, were you head of a family (see instructions, page 2, under "Who are liable")?
7. How many dependent persons under 18 (or mentally or physically defective) received their chief support from you in 1918?
8. If you claim any additional exemption on account of dependent persons other than your children, what was the relationship to you?
9. Write "R" if the return shows income received; write "A" if it shows income accrued
10. Did your wife (or husband) or minor child make a separate return? (If so, give name and address from which entered or sent as head of return.) Keith Spalding, 2626 Prairie Ave, Chicago
11. Enter below all receivable income received by (or accrued to) you during the year:

Classes of Securities	Principal	Interest	Principal	Interest	Salary, etc. (see page 2)	Amount
Bonds of First Liberty Loan converted	$ 190000 00	$ 1550	$ 180000 00	$ 6555 00		$
Other obligations of the U. S. issued before Sept. 1, 1917 (see instructions, page 2)						

12. (a) Amount of stock dividends received by (or accrued to) you wholly during the year (included in your declared [illegible] earnings of domestic or resident corporations accumulated since February 28, 1913, and prior to January 1, 1917 $ 500 00 (b) Accumulated in 1918 $ (c) Accumulated since February 28, 1913 and prior to January 1, 1918 $
13. Value of total interest-bearing Liberty Bonds and other obligations of the United States issued since September 1, 1917, received by (or accrued to) you during the year, and (stating amount of each obligation par value) held at any one time during which such interest was derived (see instructions, page 2, under B) $

	Bonds Individual Holdings: 2. Amount of Interest	3. Maximum Amount of Obligations	Shares of Holdings of Partnerships, Personal Service Corporations, and Estates and Trusts: 4. Amount of Interest	5. Maximum Amount of Obligations	6. Total of Columns 2 and 5	7. Maximum Exemption
(a) First Liberty Loan converted Third Loan and Second Liberty Loan converted (bonds received since January 1, 1918)	$	$	$	$	$	$ (See Note.) In addition an exemption of $5,000 may be claimed on account of
(b) First and Second Liberty Loans converted into Third Loan and Third Liberty Loan	74 52	5300 00			38	
Fourth Loan		30000 00				
ember 1, 1917						
(c) Total	$ 74 52	$ 35000 00	$	$	$	

NOTE.—This exemption (maximum $40,000) is limited to one and one-half times the amount of bonds of the Fourth Liberty Loan originally subscribed for and still held. State here amount of bonds of the Fourth Liberty Loan originally subscribed for and still held $

14. Enter in the table below income from partnerships, personal service corporations, and estates and trusts:

1. Name of Partnership, Personal Service Corporation, Estate, or Trust. (If Estate or Trust, Give Also Name of Fiduciary.)	2. Period (Enter 1918 or Date on Which Fiscal Year Ended)	3. Cash Dividends	4. Stock Dividends	5. Interest on Tax-Free Bonds (From Foreign and Territorial Obligations)	6. Interest on Liberty Bonds, etc., Issued Since Sept. 1, 1917	7. Other Income	8. Total
		$	$	$	$	$	$
(a) Totals taxable at 1918 rates (see instructions, page 2, under C)		$	$	$	$	$	$
(b) Totals taxable at 1917 rates (see instructions, page 2, under C)		$	$	X X X X	$	$	$

(c) Amount of stock dividends (column 4) taxable at 1918 rates (enter on line 20) $ ... Amount of stock dividends taxable at 1917 rates (enter on line 23) $

Total Net Income Subject to Normal Tax ... Calculation of Tax

FOLD OUT IS TOO LARGE TO BE FILMED

RETURN OF INCOME TAXABLE AT 1918 RATES

A. INCOME FROM BUSINESS OR PROFESSION.

1. Kind of business: Farm — 2. Business address: Lespe, Ventura County, California

3. Total sales and income from business or professional services: $

COST OF GOODS SOLD

4. Labor	$	
5. Material and supplies		
6. Merchandise bought for sale		
7. Other costs (submit schedule of principal items at foot of page or on separate sheet)		
8. Plus inventories at beginning of year		
9. Total	$	
10. Less inventories at end of year		
11. Net Cost of Goods Sold	$	

OTHER BUSINESS DEDUCTIONS:

12. Salaries and wages not reported as "Labor" under "Cost of Goods Sold"	$	
13. Rent		
14. Interest on business indebtedness		
15. Taxes on business and business property		
16. Repairs, wear and tear, obsolescence, depletion, and property losses (explain in table below)		
17. Bad debts arising from sales		
18. Other expenses (submit schedule of principal items at foot of page or on separate sheet)		
19. Total Other Business Deductions	$	

20. Net Cost of Goods Sold Plus Other Business Deductions: $

21. Net Income from Business or Profession: $ 1747972

B. INCOME FROM SALARIES, WAGES, COMMISSIONS, BONUSES, DIRECTOR'S FEES, AND PENSIONS.

1. Occupation.	2. Name and Address of Employer.	3. Gross Income.	4. Deductions, if any.
		$	$

Net Income from Salaries, etc. (total of column 3 minus total of column 4): $ — $ — $ None

C. INCOME FROM PARTNERSHIPS, PERSONAL SERVICE CORPORATIONS, AND ESTATES AND TRUSTS (not including interest on tax-free covenant bonds received through dividends, which should be included in Item F; dividends, which should be included in Item G(2); taxable interest on obligations of the U. S., which should be included in Item G(3), or income thereon at 1917 or prior year rates—see table 14, page 1): $ None

D. PROFIT FROM SALE OF LAND, BUILDINGS, STOCKS, BONDS, AND OTHER PROPERTY.

1. Kind of Property.	2. Year Acquired.	3. Name and Address of Purchaser or Broker.	4. Sale Price.	5. Original Cost or Market Value March 1, 1913.	6. Cost of Subsequent Improvements, if any.	7. Depreciation Subsequently Sustained.
			$	$	$	$

Net Profit from Sales (total of columns 4 and 7 minus total of columns 5 and 6): $ — $ — $ — $ None

E. INCOME FROM RENTS AND ROYALTIES.

1. Kind of Property.	2. Name and Address of Tenant, Lessee, Etc.	3. Amount of Rent and Royalties.	4. Expenses (Wages and Trade Discounts, Repairs, and Property Taxes).	5. Interest.	6. Taxes.	7. Other Expenses (Explain Below).
Pasturage	Various Lessees	$ 219,940 43	$ 219,940 43	$	$	$

Net Income from Rents and Royalties (total of column 3 minus total of columns 4, 5, 6, and 7): $ — $ — $ — $ — $ None

F. INTEREST ON CORPORATION BONDS CONTAINING TAX-FREE COVENANT, ON WHICH A TAX OF 2% WAS PAID BY DEBTOR CORPORATION (including such interest received through fiduciaries): $ 1350

G. OTHER INCOME (not including dividends, or interest on obligations of the United States).

	1. Gross Income.	2. Deductions, if any.
1. Interest on bonds, mortgages, and other obligations of domestic and resident corporations except as reported in Item F	$ 5000	$
2. Interest on bonds of foreign countries and corporations and dividends on stock of foreign corporations	6993 64	
3. Interest on bank deposits, mortgages, etc.	18125 95	
4.		
5.		
Net Total (total of column 1 minus total of column 2)	$ 30119 59	$ — $ 30119 59

H. TOTAL NET INCOME FROM ABOVE SOURCES: $ 48995 31

Form 1040 F—United States Internal Revenue Service

Schedule of farm income and expenses

To be sent with return Form 1040A or 1040 to the collector of internal revenue on or before March 15, 1919

(Stamp) Collector Int. Rev. Jul. 10, 1919, 1st Dist., Ill.
Name Eudora Hull Spalding.
Address 2626 Prairie Avenue, Chicago.

Instructions

This work sheet or schedule of farm income and expenses is to be used in determining the net income from a farm business. It may be used by farm owners who work their own farms or rent them out on shares, or by tenants.

If you have two or more farms, it may be desirable to fill out a separate sheet for each farm.

This schedule is to be delivered to the collector of internal revenue with your income tax return (Form 1040A or Form 1040). You should keep a copy for reference next year.

Income

All the farm income from whatever source must be reported in this schedule. Only income actually received need be included,
80 but this does not mean that the taxpayer must receive cash. Anything of value received instead of cash must be considered income to the extent of its cash value. Thus, the value of groceries, merchandise, etc., received in exchange for eggs, butter, or other product must be reported as income.

The value of farm produce which is consumed by the farmer and his family need not be reported as income; but expenses incurred in raising produce thus consumed must not be claimed as deductions.

If timber sold in 1918 was grown in part before March 1, 1913, the income to be reported is the difference between the fair market value of such timber on March 1, 1913, and the price received, less any expenses of growing the timber that have not heretofore been claimed as deductions. Report such income in the same manner as income from sale of land, in Schedule D of Form 1040 A or Form 1040.

Expenses and other deductions

Report as farm expenses only amounts actually paid out in carrying on the farm business.

Labor.—Only that part of the board of hire labor which is purchased should be included as a deduction. The value of products

furnished by the farm and used in the board of hired labor is not a deductible expense.

Rations purchased and furnished to laborers or share-croppers are deductible as a part of the labor expense.

Do not deduct the value of your own labor or that of your wife or dependent minor children.

Do not deduct amounts paid to persons engaged in household work except to the extent that the services of such employees are used in boarding and otherwise caring for farm laborers. Services of employees engaged in caring for the farmer's own household are not deductible expenses.

Fertilizers, manures, etc.—The cost of manures, commercial fertilizers, lime, raw rock phosphate, etc., that were bought during the year may be included as an expense.

Taxes.—Do not deduct inheritance or estate taxes. Federal income taxes, drainage taxes, or taxes for any improvement or betterment tending to increase the value of the property. Be ready to show tax receipts if possible. Do not deduct taxes on your dwelling or household property.

Interest on indebtedness.—All interest paid on farm mortgages, notes, and other obligations incurred to carry on the farm business should be deducted.

81 Bad debts.—Report only debts, arising from sale that have been reported as income, which have been definitely proved within the year to be worthless.

Repairs and depreciation.—Depreciation claimed should not exceed the actual cost of the property (or its fair market value March 1, 1913, if acquired before that date) divided by its probable life in years. Only such depreciation of farm buildings and equipment as is not offset by repairs may be deducted. Do not deduct repairs or depreciation of the dwelling you occupy or of your personal or household equipment.

Do not claim as a separate item depreciation of livestock or any other property included in your inventory, as such depreciation is taken care of in the reduced amount of the inventory at the close of the year.

Losses.—You may deduct losses of buildings, machinery, and other property not included in your inventory, resulting from fires or other casualties and not compensated for by insurance or otherwise. Losses of property included in your inventory are taken care of by the reduced amount of the inventory at the close of the year.

Automobile expense.—You may deduct expenses of operation, repairs, and depreciation of automobiles used exclusively in the farm business; for a part of the time only a corresponding part of the expenses may be deducted.

How to fill out this schedule

Enter on pages 2 and 3 the amounts received from sales of farm crops, animals, and products, and the value of crops, animals, and

products that were on hand at the beginning and end of the year. Go over the list of farm expenses on page 3 and enter the amount of each kind of expense separately so far as possible. Fill in the statement of repairs and depreciation of farm buildings, etc., on page 4.

In case you have complete farm records already summarized, enter the totals from your books in the spaces provided therefor.

When all the receipts and expenses have been entered, bring the various totals together in the summary on page 4. The figures inclosed in parentheses are intended as a key to aid you in bringing forward the proper totals.

When you have determined the net farm income, transfer the amount to line 21 in Schedule A of the income tax return (Form 1040A or Form 1040).

While this schedule is intended to cover in detail only your 82 income from the farm business, there are added at the bottom of page 4 spaces for making notes regarding income from other sources. Such income should be reported in detail in Schedules B to K of Form 1040A or 1040.

Crops sold and on hand

Page 2

Kind of crops grown	Acres in crop	On hand at beginning of year		
		Quantity	Inventory value	
			Per unit	Total
				$
Totals				$

(1)

Kind of crops grown	Acres in crop	Sold during year		
		Quantity	Sale price	
			Per unit	Total
Beans		*Lbs.* 725,286		$35,615.50
Rental of bean land—1917				2,376.99
Nursery trees		425	75c.	318.75
Totals				$38,311.24

(2)

Crops sold and on hand—Continued

Kind of crops grown	Acres in crop	On hand at end of year		
		Quantity	Inventory value	
			Per unit	Total
				$
Totals				$

(3)

83 *Livestock bought, sold, and on hand*

Kind of animals	On hand at beginning of year		
	Number	Inventory value	
		Per unit	Total
Cows			$
Heifers			
Calves			
Bulls			
Steers			
Horses			
Mules			
Colts			
Ewes			
Lambs			
Brood sows			
Other hogs			
Chickens			
Turkeys			
Ducks			
Bees			
Totals			$

(4)

Kind of animals	Purchased during year		
	Number	Cost	
		Per unit	Total
Cows			$
Heifers			
Calves			
Bulls			
Steers			
Horses			
Mules			
Colts			
Ewes			
84 Lambs			
Brood sows			
Other hogs			
Chickens			
Turkeys			
Ducks			
Bees			
Totals			$

(5)

Livestock bought, sold, and on hand—Continued

Kind of animals	Sold during year		
	Number	Sale price	
		Per unit	Total
Cows			
Heifers			$
Calves			
Bulls			
Steers			
Horses			
Mules			
Colts			
Ewes			
Lambs			
Brood sows			
Other hogs			
Chickens			
Turkeys			
Ducks			
Bees			
Totals			$

(6)

Kind of animals	On hand at end of year			Lost during year (number)
	Number	Inventory value		
		Per unit	Total	
Cows				
Heifers			$	
Calves				
Bulls				
Steers				
Horses				
Mules				
Colts				
Ewes				
Lambs				
Brood sows				
Other hogs				
Chickens				
Turkeys				
Ducks				
Bees				
Total			$	

(7)

Page 3

Crop products sold and on hand

Kind	On hand at beginning of year		Sold during year			On hand at end of ye	
	Quantity	Inventory value	Quantity	Sale price		Quantity	Inventor value
				Per unit	Total		
Lemons...boxes		$	21,863		$106,079.71		$
Oranges....do			3,692		17,083.83		
Walnuts ....pounds			35,322		6,441.80		
Total		$			$129,605.34		$
		(8)		(9)			(10)

86

Livestock products sold and on hand

Milk		$			$		$
Butter							
Cream							
Cheese							
Eggs							
Wool							
Hides							
Honey							
Totals		$			$		$
		(11)			(12)		(13)

Miscellaneous receipts

Description	Amount
Machine work, hire of teams, etc	$
Total	$
	(14)

Inventory of supplies

Kind	Inventory value	
	At beginning of year	At end year
Purchased feeds	$	$
Seeds		
Fertilizers		
Spray materials		
Totals	$	$
	(15)	(16)

87 *Expenses*

Items.	Amount
Hired labor (regular)	84,078.01
Hired labor (extra)	
Board of hired labor	10,212.82
Cost of purchased materials furnished lab.	
Feed, hay, straw, etc	3,062.06
Feed, grain, concentrates	3,636.46
Feed grinding	
Silo filling	
Corn shredding	
Cotton ginning	
Milk hauling	
Ice	
Horseshoeing	
Breeding fees	
Veterinary fees	
Seeds, plants, etc	
Fertilizers, manure	1,773.73
Spray materials	236.12
Twine	
Threshing	
Baling	
Machine work hire	
Fuel and oil for farm work	6,996.30
Barrels, bags, crates	
Shook	7,184.24
Farm insurance	30.00
Taxes	6,085.75
Water rent	
Cash rent	250.00
Interest on farm notes & mortages	1,071.49
Selling expense	2,472.34
Misc. material	19,078.58
Total	$146,167.90
	(17)

88 Page 4 *Repairs and depreciation*

Description	Cost of property (or market value Mar. 1, 1913)	Repairs	Depreciation	
			Rate	Amount
Farm buildings	$	$		$
Farm fence, drains, ditches, etc				
Farm machinery and tools				
Total	$	$		$
		(18)		(19)

Summary

	Amount received for farm products sold or exchanged:		
1.	Crops	(2)	$38,311.24
2.	Livestock	(6)	
3.	Crop products	(9)	129,605.34
4.	Livestock products	(12)	
5.	Miscellaneous	(14)	
6.	**Total receipts**		$167,916.58
	Inventory value of farm crops, etc., at end of year:		
7.	Crops	(3)	$
8.	Livestock	(7)	
9.	Crop products	(13)	
10.	Livestock products	(13)	
11.	Supplies	(16)	13,622.14
12.	**Total inventory at end of year**		$13,622.14
13.	**Total receipts plus inventory at end of year (items 6, plus item 12)**		$181,538.72
	Farm expenses, etc.:		
14.	Cost of livestock purchased during year	(5)	$
15.	Expenses	(17)	146,167.90
16.	Repairs	(18)	
17.	Depreciation	(19)	11,971.43
18.			
19.	**Total expenses, etc**		$158,139.33
	Inventory value of farm crops, etc., at beginning of year:		
20.	Crops	(1)	$
21.	Livestock	(4)	
22.	Crop products	(8)	
23.	livestock products	(11)	
24.	Supplies	(15)	5,923.67
25.	**Total inventory at beginning of year**		$5,923.67
26.	**Total expenses plus inventory at beginning of year item 19 plus (item 25)**		$164,063.00
27.	**Net farm income to be reported in Schedule A, line 21, of Form 1040A or Form 1040 (item 13 minus item 26)**		$17,475.72

89 *Other income to be reported on return*

[Form 1040A or Form 1040]

Description	Gross	Deductions	Net
Income from salaries, wages, commissions, bonuses, director's fees, and pensions (to be reported in Schedule B)	$	$	$
Income from partnerships, personal service corporations, and estates and trusts (to be reported as Item C)			
Income from sale of land, buildings, stocks, bonds, and other property (to be reported in Schedule D)			
Income from rents and royalties (to be reported in Schedule E)			
Interest on corporation bonds containing tax-free covenant, on which a tax of 2% was paid by debtor corporation (to be reported as Item F)			
Other income (to be reported in Schedule G)			
Dividends on stock of corporations organized or doing business in the United States (to be reported as Item K on Form 1040A, or K(a) on Form 1040)			
Interest on obligations of the United States in excess of the exemptions allowed by law (to be reported as Item K(b), Form 1040)			

Rancho Sespe—Depreciation

	Per cent	1913	Since	
Automobile	33⅓		1,050.57	350.19
Barn equipt	20	1,148.85		229.77
Boarding house equipment	10	1,094.51		148.58
Buildings	4	29,890.07	3,396.99	1,331.48
Firing equipt	10	16,639.32	46.59	1,668.59
Japanese dormitory equipt	10	354.30		35.43
Livestock	10	10,327.78	175.00	1,015.28
Office furniture	10	118.10		11.81
Pipe lines con	2	32,136.83		642.74
" " steel	7	12,649.84		885.49
Pumping plant	10	28,414.44		2,841.44
Ranch implements	15	4,668.94	4,009.95	1,301.70
Tractors	15	2,784.25		417.64
Packing house	4	18,501.96	38.73	741.63
Packing house				
Equipment	10	3,110.53	388.65	349.66
Siding		2,093.34		
				11,971.43

b8

90 *Plaintiff's Exhibit C*

This indenture, made this first day of January, A. D. 1905, by and between Morton Denison Hull and Katharine B. Hull, his wife; Eudora Hull Gaylord, formerly Eudora M. Hull, a widow, all of Chicago, Illinois; Marie M. Owsley, formerly Marie M. Boeing, and Frederick D. Owsley, her husband, of Greenwood, Albemarle County, Virginia; Marshall H. Alworth and Nellie Alworth, his wife, of Duluth, Minnesota, and William Edward Boeing, an unmarried man, individually and as trustee for Caroline Marie Boeing and Caroline Marie Boeing, an unmarried woman, both of Greenwood in Albemarle County, Virginia, hereinafter called the lessors, parties of the first part, and Lake Superior Consolidated Iron Mines, a corporation duly organized and existing under and by virtue of the laws of the State of New Jersey, hereinafter called the lessee, party of the and described as follows, to wit:

First

That the lessors, for and in consideration of the sum of one dollar and other valuable considerations to them in hand paid by the lessee, the receipt and sufficiency whereof are hereby acknowledged, and in further consideration of the covenants, conditions and provisions of this lease to be kept and performed by the lessee, do hereby let, demise and lease unto the lessee, its successors and assigns, for a term of forty-five (45) years from and after the first day of January, 1905, as to the lands hereinafter described and designated tracts, numbers one to five, both inclusive, and for a term of fifty (50) years from and after the first day of January, 1905, as to the lands hereinafter described and designated as tract number six, the lands and premises (for the purposes of this lease regarded as one parcel) situate in the county of St. Louis and State of Minnesota and described as follows, to wit:

Tract No. 1. Lots No. three (3) and four (4) in section six (6), in township fifty-seven (57) north, of range twenty (20) west, of the fourth principal meridian, being the same as the north half of the northwest quarter (N. ½ of N. W. ¼) of said section six (6).

Tract No. 2 The south half of the northeast quarter (S. ½ of N. E. ¼) and the northeast quarter of the southeast quarter (N. E. ¼ of S. E. ¼) of section two (2) in township
91 fifty-seven (57) north of range twenty-one (21) west of the fourth principal meridian.

Tract No. 3. The northwest quarter of the southwest quarter (N. W. ¼ of S. W. ¼) of section (1), and the southeast quarter of the southeast quarter (S. E. ¼ of S. E. ¼) of section two (2) in township fifty-seven (57) north of range twenty-one (21) west of the fourth principal meridian.

Tract No. 4. Lot No. two (2) of section thirty-one (31) in township fifty-eight (58) north of range seventeen (17) west of the fourth principal meridian.

Tract No. 5. Lot No. five (5) and the southeast quarter of the northwest quarter (S. E. ¼ of N. W. ¼) of section six (6) in township fifty-seven (57) north of range twenty (20) west of the fourth principal meridian, being the south half of the northwest quarter (S. ½ of N. W. ¼) of said section six (6), and heretofore and now platted and known as the "town of Hibbing," subject, however, to all outstanding deeds and conveyances reserving all minerals and the right to mine and remove the same, heretofore made and delivered to divers persons by the lessors and their predecessors in interest of and to certain lands in the said "town of Hibbing," and which are now owned by parties other than the lessors, it being the express intention hereof to lease hereby to the lessee all of the said "town of Hibbing" now owned by the lessors, and all the mining rights, interests, and estate of the lessors and each of them in, of, and to all the said lots as expressly reserved by all such deeds and conveyances and subject only to such rights as may be possessed by the grantees under such deeds and conveyances, or their successors in interest.

Tract No. 6. The east half of the southeast quarter (E. ½ of S. E. ¼) of section eleven (11), the southeast quarter of the northwest quarters (S. E. ¼ of N. W. ¼) and the west half of the southwest quarter (W. ½ of S. W. ¼) of section twelve (12), all in township fifty-seven (57) north of range twenty-one (21) west of the fourth principal meridian, and the northwest quarter (N. W. ¼) of section seven (7) in township fifty-seven (57) north of range twenty (20) west of the fourth principal meridian, subject, however, to the certain deed dated July 3, 1896, made and delivered by Morton Denison Hull and certain of the lessors to the village of Hibbing, Minnesota, of an undivided two-thirds interest in ten acres, more or less, in the southwest portion of the southwest quarter of the northwest
92 quarter of said section seven, in township fifty-seven north of range twenty west, and to the certain other deed, unrecorded,

if any there were, given about the same date, and conveying the remaining undivided one-third interest in and to said ten acres of land to said village of Hibbing, which deed or deeds except and reserve unto the grantors therein all minerals that may exist upon, in, or under said premises, with the right to enter upon said premises, and mine and remove such minerals with as slight injury to the surface under the circumstances as can reasonably be done and without liability for damages therefrom, and the former of which was recorded in the office of the register of deeds of St. Louis County, Minnesota, on the 15th day of September, 1900, in book 137 of deeds at pages 232 et seq., reference to which deed and the record thereof is hereby made for greater particularity; it being the intention hereof to lease hereby to the lessee all of said northwest quarter of said section seven, in township fifty-seven north of range twenty west, now owned by the lessors and each of them and all mining rights, interests, and estate of the lessors and each of them in, of, and to all of said land and each and every part thereof, including said land and premises covered by said deed or deeds to said village of Hibbing, and subject only to such rights as may have been obtained by said village of Hibbing and its grantees under said deed or deeds; and the lessee hereby covenants and agrees that it will not conduct its mining operations on the land described in said deed to the village of Hibbing so as to render the grantors thereunder liable to the village of Hibbing and its grantees.

All of the said lands are hereby expressly leased subject to any rights of way, as evidenced by instruments of record, through, over, or across any parcel or parcels thereof heretofore granted to the Duluth, Missabe & Northern Railway Company and the Duluth, Mississippi River & Northern Railroad Company.

Said lands and premises are hereby leased and demised by the lessors to the lessee for the purpose of exploring for and mining, taking out, removing, and shipping therefrom the merchantable iron ore (as well as other mineral as hereinafter provided) which is, or hereafter may be found, on, in, or under said lands, together with the right to construct all buildings and other structures, and to make all excavations, openings, ditches, drains, railroads, wagon roads, and all other improvements upon said lands and premises, which are or may become necessary or suitable for the mining, 90 removing, and shipping of the iron ore therefrom and the carrying on of mining operations thereon and together with the right, during the continuance of this lease, to cut and use all of the timber, other than pine, which may be upon said lands, free and without charge, so far as may be necessary for fuel and in the construction of buildings and structures required in the operation of any mine or mines on said lands, and for drains, tramways, supports, or shafts of or within any such mine or mines, or in connecting the same with any line or lines of railroad over and upon which said ore may be transported. The term merchantable iron ore as used in this lease

shall be taken to mean such ore as shall be merchantable from time to time as the work of mining progresses.

The lessee shall likewise have the right, free and without charge, by itself or its agents, servants, and employes, to erect on any unused portion of the surface of the demised premises, and use, occupy, and enjoy all buildings necessary and convenient for its own use for the purposes of this lease as a mining lease; and the lessee may permit its agents, servants, or employees to erect thereon, use, occupy, and enjoy such store buildings, boarding and dwelling houses as may be necessary and convenient for the use of its employes only. All rents, however, which may be received by the lessee herein for the use, occupation, and enjoyment of such store buildings, boarding and dwelling houses, or the lands upon which they are located, shall be paid over to the lessors herein annually in January of each year at the time when the payment of the royalty is made for the last quarter of the preceding calendar year. In every case, however, any such use and occupation shall absolutely cease and terminate upon the termination of this lease, whether by acts of the parties or either of them, or by expiration of the term, and all such buildings and houses shall be removed from the demised premises within the time and subject to the provisions of article nine hereof.

Second

The lessee for itself, its successors and assigns, hereby covenants and agrees to pay to the lessors, from and after January 1st, 1905, a royalty on all merchantable iron ore mined and shipped from said demised lands, while this lease shall remain in force, at the rate of twenty-five cents (25c) for each gross ton of two thousand two hundred forty pounds (2,240) avoirdupois. The royalty shall be
94 due and payable on the twentieth days of April, July, October, and January in each calendar year, which days are hereinafter called quarter days. The payment on each quarter day shall be for the full amount of ore mined and shipped from said lands during the three months immediately preceding the first day of the month in which payment shall become due.

The lessee for itself, its successors and assigns, further covenants and agrees with the lessors that from January 1st, 1905, to January 1st, 1950, the minimum yearly output from the demised lands under this lease shall be six hundred thousand (600,000) gross tons of iron ore, and that, thereafter, for the remaining five (5) years of the term for which the lands described in tract No. six (6) are hereby leased and demised, the minimum yearly output from said lands described in tract No. six (6) shall be three hundred thousand (300,000) gross tons of iron ore.

And the lessee further covenants and agrees that, for each and every calendar year, during the existence of this lease, it will mine and ship from said lands the agreed yearly minimum output, or, in

case in any one or more of such calendar years the lessee shall not actually mine and ship from said lands the full quantity of the agreed yearly minimum output, the lessee will, nevertheless, pay to the lessors advance royalty, to be considered and treated as ground rent, in addition to the royalty paid for iron ore actually shipped during that year, such sum as shall, together with the amount paid as royalty on iron ore actually shipped during said year, amount to the royalty on the minimum output for that year.

Said advance royalty shall be paid quarterly and at the times and in the manner hereinbefore provided for the payment of royalties on ore actually shipped and in years when no ore is mined shall be in equal quarterly installments. If in any quarter year the lessee shall mine and ship more ore than one-fourth the agreed annual minimum output, the royalty thereon, in excess of the royalty on one-fourth the annual minimum output, may be satisfied pro tanto by the application of any royalty paid for any previous quarter of said year for which ore has not been mined and shipped. And any royalty paid on ore mined and shipped in any quarter year in excess of one-fourth the annual minimum output may be applied to discharge the obligation to pay advance royalty for any subsequent quarter of the same year. The lessee shall not be required in any calendar year to pay royalty on more than the agreed yearly minimum output, unless more than such minimum is mined and
95 shipped in such year, and shall be entitled to apply as payment for royalty on ore mined and shipped in excess of the minimum in any subsequent year or years, any advance or minimum royalty paid in any former year or years for which ore has not been mined and shipped.

The obligation of the lessee to pay advance royalties, as aforesaid, shall continue in force without regard to the quantity or quality of iron ore existing in said lands, during the full term of this lease, or until the same shall be terminated, or surrendered, or assigned in the manner herein provided; and in case of an assignment of this lease, the obligation to mine or make such yearly minimum royalty payment, as well as all other provisions of this lease, shall rest upon and bind the assignee as fully as the lessee is hereby bound.

At the time of making each payment of royalty the lessee shall transmit to the lessors an exact and truthful statement of the amount of iron ore shipped from the demised premises for the period for which royalty is then paid.

Third

The iron ore shipped from the said lands by the lessee shall be weighed by the railway company transporting the same therefrom and the weights so ascertained by the railway company shall prima facie determine the quantity as between the parties hereto.

The lessee shall and will furnish the lessors monthly statements showing the said railroad weights of ore shipped, and the lessors shall have the right, by themselves or their duly authorized agents, to

inspect, view, and test the correctness of the railway company's weights at any time or times and in such manner as it may seem proper to adopt; it being understood that any errors in these respects when ascertained shall be cognizable and corrected, and any such differences shall be settled and paid for upon the next regular quarter day. And the lessee shall and will, on application, at all regular times, furnish the lessors with copies of analyses and all information connected with exploration or development work upon said lands, and the lessors shall have the right by themselves or by duly authorized agents, to enter upon said lands, mines, and premises at any time or times and inspect and survey the same and to measure the quantity of ore which shall have been mined thereon or shipped therefrom, provided they shall not unnecessarily or unreasonably hinder or interrupt the operations of the lessee.

96 Fourth

The lessee hereby covenants and agrees to conduct all its mining operations on said lands in a good, workmanlike manner and in accordance with the requirements of good engineering, and so as not to do or cause or permit any unnecessary or unusual permanent waste or injury to the said premises, or inconvenience or hindrance in the subsequent operations of the mine or mines thereon, and in the working of said mine or mines the lessee shall depost all earth, rock, and other useless material or rubbish at such place or places on the demised lands and in such manner as will not conflict with or embarrass the future operations of said mine or mines.

And the lessors hereby agree that the lessee may deposit on the lands hereby demised and designated as tract No. six (6), earth, rock, and other useless material or rubbish from the certain lands now under lease to and controlled by the lessee under a certain mining lease dated the second day of October, 1899, made by George L. Burrows and others, as lessors, and commonly known as the Burrows-Rust lease, but only at such place or places thereon and in such manner as will not conflict with or in any way embarrass the future operations of any mine or mines on the lands described in said tract No. six (6); Provided, however, that the lessee secures from the lessors of said Burrows-Rust lease the right, license, and permission to deposit substantially a similar yardage of waste material and stripping removed in the lessee's stripping and mining operations on the lands hereby demised on the certain of the tracts embodied in the Burrows-Rust lease and described as the south half of the southeast quarter (S. ½ of S. E. ¼) section one (1), the southeast quarter of the northeast quarter (S. E. ¼ of N. E. ¼) and the northeast quarter of the southwest quarter (N. E. ¼ of S. W. ¼) of section twelve (12), and the southeast quarter of the northwest quarter (S. E. ¼ of N. W. ¼) of section two (2), all in township fifty-seven (57) north, of range twenty-one (21) west of the fourth principal meridian, in St. Louis County, Minnesota.

Fifth

The lessee further covenants and agrees to pay all the taxes and assessments, ordinary and extraordinary, general and specific,
97 which may be levied or assessed upon said lands demised hereby and on the iron ore mined thereon and all improvements and personal property thereon, while this lease remains in force, and to furnish the lessors with duplicate tax receipts showing the payment of all such assessments and taxes; provided, however, that the lessee shall always have the right to contest in the courts or otherwise, the validity of such taxes and assessments in case it shall deem the same unlawful, unjust, unequal or excessive, or to take such other steps or proceedings as it may deem necessary to secure a cancellation, reduction, readjustment, or equalization thereof before it shall be required hereunder to pay and discharge the same or any part thereof. And upon the termination of this lease, by surrender or otherwise, as herein provided, the lessee shall and will peaceably surrender possession of the said lands and the whole thereof to the lessors.

The lessee further hereby covenants and agrees that while this lease remains in force, or until it is surrendered or terminated in the manner as herein provided, it will protect said lands and premises and the improvements and iron ore in stockpile thereon from all mechanics' and laborers' liens and keep the title to the same free and clear from all clouds and incumbrances arising from such claims or liens in any way because of its mining operations thereon or the use and occupation thereof by the lessee, its agents, servants, employees, or contractors.

Sixth

The lessors hereby covenant and represent that the demised lands and premises are now owned by them in fee, free and clear from all incumbrances, in the following proportions, to wit:

Morton Denison Hull, an undivided one-sixth interest thereof; Eudora Hull Gaylord, an undivided one-sixth interest thereof; Marie M. Owsley, an undivided one-sixth interest thereof; Marshall H. Alworth, an undivided one-third interest thereof; William Edward Boeing, an undivided one-twelfth interest thereof; and William Edward Boeing, as trustee, for the use and benefit of Caroline Marie Boeing, under and by virtue of the provisions of a certain trust deed dated the 13th day of May, 1903, between Caroline Marie Boeing, as party of the first part, and William Edward Boeing, as party of the second part, and recorded in the office of the register of deeds of St. Louis County, Minnesota, on July 1st, 1903, in book 201 of deeds at pages 230 et seq, an undivided one-twelfth interest thereof.

98 And the lessors, each for his or her interest alone, will the lessee in the quiet and peaceful possession of the demised

premises and each and every part thereof, during the term aforesaid, or until the termination of this lease as herein provided, warrant and defend against all lawful claims and demands of any and all persons and corporations, save and except any such claims or demands as may be created by the lessee or exist by virtue of its agents, servants, or employees.

The several payments required to be made hereunder shall be made, for the use and benefit of the several lessors and in the proportions in this article named, at and to such bank or banks in the city of Chicago, Illinois, or elsewhere in any one or more of the United States, as the lessors, each for himself, or his or their legal representatives, successors in interest or assigns, may from time to time in writing designate, and the bank or banks so designated shall be deemed the agent or agents of the lessors, respectively, for the purpose of receiving, collecting, and receipting for such payments.

The payments provided in this lease, to be made by the lessee, shall be made in gold coin of the United States of the present standard or its equivalent.

Seventh

It is mutually covenanted between the parties hereto, and this lease is granted and accepted upon condition, that the lessee shall have the right, at any time, on thirty (30) days notice to terminate this agreement and lease, by giving written notice in the manner hereinafter provided to the lessors who shall and will in such case acknowledge in writing the receipt of such notice, and this lease shall terminate thirty (30) days after the giving of such notice whether the same shall be so acknowledged or not.

All arrearages and sums, including taxes, which shall be due and payable under this lease, up to the time of its termination as set forth in the said notice, must and will be paid by the lessee within thirty (30) days after such termination, upon settlement and adjustment thereof, but the lessors shall not in any event be required or liable to repay to the lessee any sum which has been paid as advance royalty; and the lessee upon such termination must and will forthwith execute and record in the office of the register of deeds of St. Louis County, Minnesota, a formal relinquishment of this lease, provided the same shall have been recorded there.

99 Said notice of and for the termination of this lease may be given by registered letter or letters, mailed from any post office in the United States, postage prepaid, and addressed to the lessors, or their heirs, legal representatives, successors in interest, or assigns, at their last known places of residence, or in care of the bank or banks at which the royalty is for the time being payable.

And it is further agreed that the lessee shall have the right to contract with others to work any mine or mines, which now are, or

hereafter may be, discovered upon said lands, or sublet or subcontract the same, or to assign this lease, at the option of the lessee, with the same rights and privileges, as are herein granted to the lessee, it being expressly understood however, that any such assignment shall not operate as a release or discharge of the lessee from the performance of the conditions of this lease, until and unless the lessors shall specifically consent to said assignment in writing; and it is further provided that the uninterrupted right of the lessee, to take, use and ship the iron ore from said lands, as herein provided, shall continue unsuspended, notwithstanding any disagreement between the parties hereto respecting the same or this lease, provided it or they shall duly pay for all ore shipped, or agreed to be shipped or paid for, at the time or times and in the manner in and by this lease provided.

Eighth

This lease is granted and accepted upon the condition that, if the royalty hereby reserved, or the advance royalty or ground rent hereby provided for or agreed to be paid, or any part thereof, be and remain unpaid after the days and times above specified, and if the same shall remain in default for a period of sixty (60) days, or in case the lessee shall fail to keep any other of the covenants or conditions herein expressed to be kept and performed by it, and such failure shall continue for sixty (60) days after the receipt by it of written notice from the lessors, specifying the default, neglect, and failure complained of, then, and from thenceforth, and in either of said events, but not otherwise, it shall be lawful for the lessors, at their option, to terminate this lease and to take possession of the said demised premises with or without any previous process whatever, and to re-enter, have and possess the same again as fully as if no lease had been given to the lessee, and the lesse and all parties claiming under it shall be wholly excluded therefrom and this lease shall become and be wholly void and at an end subject to the provisions of article ninth hereof.

Any notice of non-payment or other default or other notice in and by this lease provided to be given to the lessee may be served by the lessors upon the lessee by registered letter deposited in any postoffice in the United States with postage prepaid, addressed to the lessee at the Wolvin Building at Duluth, Minnesota, or at such other place as the lessee, or its successors in interest, may from time to time in writing state to the lessors is the postoffice address of the holder hereof.

The lessors hereby reserve and shall at all times, have, possess, and hold a lien upon all ore mined and upon all improvements made upon said demised premises by the lessee, as a security for any unpaid balances of money due hereunder, such balances being deemed and to be treated as balances of purchase money, and which lien

may be enforced against such property in like manner as liens conferred by chattel mortgage are or may be entitled to be enforced by the laws of the State of Minnesota.

Ninth

It is mutually covenanted that upon the termination of this lease, whether by acts of the parties, or either of them, or by expiration of the term, the lessee shall have sixty (60) days in which to remove all engines, tools, machinery, railroad tracks, buildings, dwellings, and structures and all other property of every nature or description erected or placed by it upon the demised premises, provided that all taxes, royalties, and other dues shall have been paid and all the other conditions performed by the lessee; but the lessee shall not remove or impair any structure placed in the mine or mines upon said premises, or any timber or frame work necessary to the use or maintenance of the shafts or the approaches to the mine or mines, or the tramways within the same, and on failure within the said sixty (60) days to so remove such property, all of the same shall belong to and become the property of the lessors or their successors in interest.

Tenth

In case ores or minerals other than iron ore shall be discovered upon the demised premises, the lessee shall be, and hereby is, expressly granted the right to mine and ship the same and
101 the royalty thereon to be paid to the lessors shall be thirty-three (33) per centum of the market value or selling price of all such ores or minerals, in the market or markets therefor, less all transportation charges which transportation charges shall first be deducted from such market value or selling price, and retained by the lessee; and such royalty shall be due and payable at the same times and in the same manner that the royalty on iron ore shall be due hereunder; and the quarterly reports of the grade, kind, quantity, and quality of such other ores and minerals shall be made at the same times and in the same manner as reports concerning iron ore are required to be made hereunder.

Eleventh

All covenants, provisions, terms, and conditions of this lease shall run with the land and shall inure to the benefit of and be binding upon the heirs, legal representatives, successors in interest, successors, and assigns of the lessors and lessee, respectively.

In witness whereof the lessors have hereunto set their respective hands and seals, and the lessee has caused these presents to be executed in its corporate name by its president or vice president, and attested by its secretary or assistant secretary, and its corporate seal to be hereunto affixed, the day and year first above written.

This lease is executed in quadruplicate, and the four papers thus executed shall be deemed but one instrument.

(Signed) MORTON DENISON HULL. [SEAL.]
(Signed) KATHARINE B. HULL. [SEAL.]

As to lessors Hull:
(Signed) BARNARD M. BAUMER.
(Signed) NELLIE O. MILLER.

(Signed) EUDORA HULL GAYLORD. [SEAL.]

As to lessor Gaylord:
(Signed) W. W. BENEDICT.
(Signed) T. W. HEALY.

(Signed) MARIE M. OWSLEY. [SEAL.]
(Signed) FREDERIC D. OWSLEY. [SEAL.]

As to lessors Owsley:
(Signed) W. S. RODES.
(Signed) ALBERT P. OWSLEY.

(Signed) MARSHALL H. ALWORTH. [SEAL.]
(Signed) NELLIE ALWORTH. [SEAL.]

102 As to lessors Alworth:
(Signed) L. R. FERNALD.
(Signed) J. M. CRAMER.

(Signed) WILLIAM EDWARD BOEING. [SEAL.]
Individually and as Trustee.

As to lessor William Edward Boeing individually and as trustee:
(Signed) W. S. RODES.
(Signed) ALBERT P. OWSLEY

(Signed) CAROLINE MARIE BOEING. [SEAL.]

As to lessor Caroline Marie Boeing:
(Signed) W. S. RODES.
(Signed) ALBERT P. OWSLEY.

LAKE SUPERIOR CONSOLIDATED IRON MINES,
By (Signed) THOMAS MURRAY, *Vice President.*
[SEAL.]
Attest:
(Signed) C. D. FRASER,
Secretary.

As to the lessee:
(Signed) JOHN D. CLARKE.
(Signed) G. N. WHITE.

STATE OF ILLINOIS,
County of Cook, ss.

On this 13th day of March, A. D. 1905, before me, a notary public within and for said county and State, personally appeared Morton Denison Hull and Katharine B. Hull, his wife, to me personally known and known to be the identical persons described in and who executed the foregoing and within instrument and lease, and they ackowledged that they executed the same as their free act and deed.

[NOTARIAL SEAL.] (Signed) BERNARD J. BAUMER,
Notary Public, Cook County, Illinois.

103 STATE OF CALIFORNIA,
County of Los Angeles, ss.

On this 20th day of March A. D. 1905, before me, a notary public within and for said county and State, personally appeared Eudora Hull Gaylord, a widow, to me personally known and known to be the identical person described in and who executed the foregoing and within instrument and lease, and she acknowledged that she executed the same as her free act and deed.

[NOTARIAL SEAL.] (Signed) W. W. BENEDICT,
Notary Public, Los Angeles County, California.

STATE OF VIRGINIA,
County of Albermarle, ss.

On this third day of April A. D. 1905, before me, a notary public within and for said county and State, personally appeared Marie M. Owsley and Frederic D. Owsley, her husband, to me personally known and known to be the identical persons described in and who executed the foregoing and within instrument and lease, and they acknowledged that they executed the same as their free act and deed.

[NOTARIAL SEAL.] (Signed) W. S. RODES,
Notary Public, Albermarle County, Virginia.
My commission expires 22nd day of April 1907.

STATE OF FLORIDA,
County of Hillsboro, ss.

On this 27th day of March, A. D. 1905, before me, a notary public within and for said county and State, personally appeared Marshall H. Alworth and Nellie Alworth, his wife, to me personally known to be the identical persons described in and who executed the foregoing and within instrument and lease, and they acknowledge that they executed the same as their free act and deed.

[NOTARIAL SEAL.] (Signed) J. M. CRAMER,
Notary Public, Hillsboro County, Florida.
My commission expires Dec. 13, 1908.

104 STATE OF VIRGINIA,
County of Albermarle ss.

On this third day of April, A. D. 1905, before me, a notary public within and for said county and State, personally appeared William Edward Boeing, an unmarried man, to me known to be the identical person described in and who executed the foregoing and within instrument and lease individually and as trustee for said Caroline Marie Boeing, and he acknowledged that he executed the same as his own free act and deed, and, as said trustee, as the free act and deed of said Caroline Marie Boeing.

[NOTARIAL SEAL.] (Signed) W. S. RODES,
Notary Public, Albermarle County, Virginia.
My commission expires 22nd day of April, 1907.

STATE OF VIRGINIA
County of Albermarle, ss.

On this third day of April, A. D. 1905, before me, a notary public within and for said county and State, personally appeared Caroline Marie Boeing, an unmarried woman, to me personally known and known to be the identical person described in and who executed the foregoing and within instrument and lease, and she acknowledged that she executed the same as her free act and deed.

[NOTARIAL SEAL.] (Signed) W. S. RODES,
Notary Public, Albermarle County, Virginia.

My commission expires 22nd day of April, 1907.

105 STATE OF NEW YORK,
City and county of New York, ss.

On this 14th day of April, A. D. 1905, before me, a notary public within and for said county and State, personally appeared Thomas Murray, to me personally known, who being by me first duly sworn did say that he is the vice president of the Lake Superior Consolidated Iron Mines, a corporation duly existing under the laws of the State of New Jersey and the lessee named in the within and foregoing instrument and lease, and that the seal affixed to the foregoing instrument and lease is the corporate seal of said corporation, and that said lease was signed and sealed in behalf of said corporation by authority of its board of directors, and said Thomas Murray duly acknowledged said lease to be the free act and deed of said corporation.

[NOTARIAL SEAL.] (Signed) E. A. BRENNAN,
Notary Public in and for the County and State of New York.

106 *Plaintiff's Exhibit D*

This indenture, made this ninth day of December, in the year of our Lord one thousand nine hundred and one, by and between Morton Denison Hull and Katharine B. Hull, his wife; Eudora M. Gaylord, formerly Eudora M. Hull, and Edward L. Gaylord, her husband, all of Chicago, Illinois; Marie M. Owsley, formerly Marie N. Boeing, and Frederick D. Owsley, her husband, of Greenwood, Albemarle County, Virginia; Marshall H. Alworth and Nellie Alworth, his wife, of Duluth, Minnesota; and Frank A. Schulte, of Detroit, Michigan, as guardian of William Edward Boeing and Caroline Marie Boeing, minors, as parties of the first part, hereinafter designated as the lessors, and William H. Cole, of Duluth, Minnesota, as party of the second part, hereinafter designated as the lessee.

Witnesseth that the lessors, for and in consideration of the sum of one dollar, and other valuable considerations to them in hand paid by the lessee, the receipt whereof is hereby acknowledged, and in

further consideration of the covenants, promises, and conditions hereinafter contained, to be kept and performed by the lessee, do hereby let, lease, and demise unto the lessee, his heirs and assigns, for a term of fifty (50) years from and after the first day of January, 1902, as to an undivided five-sixths interest in and to the land hereinafter described, now owned as tenants in common by the lessors other than said guardian, and for the term of twenty-five (25) years from and after the first day of January, 1902, as to the remaining undivided one-sixth thereof, now held and owned as tenants in common by the said minors, William Edward Boeing and Caroline Marie Boeing, of which interest said Frank A. Schulte, as the duly qualified and acting guardian of said minors, is the lessor, the following-described lands situated in the county of St. Louis and State of Minnesota, to wit:

The northeast quarter of the northeast quarter of section eleven (11) and the north half of the northwest quarter of section twelve (12) in township fifty-seven (57) north, range twenty-one (21) West;

Said lands are hereby leased by the lessors to the lessee for the purpose of exploring for and mining, taking out, and removing therefrom the merchantable iron ore (as well as other mineral as hereinafter provided for), which is or which may hereafter be
107 found on, in, or under said lands, together with the right to construct all buildings and to make all excavations, openings, ditches, drains, railroads, wagon roads, and all other improvements on said lands and premises, which are or which may become necessary or suitable for the mining or removal of the iron ore therefrom and the carrying on of mining operations thereon.

Provided, however, that the lessee, his heirs and assigns, shall have the right at any time, upon thirty day's notice, to terminate this agreement and lease in so far as it requires the lessee to mine ore on said lands, or to pay royalty therefor, or to pay taxes thereon, by giving written notice in manner as hereinafter provided to the lessor or their legal representatives or their assigns, who shall in such case acknowledge in writing the receipt of such notice, and this lease shall terminate thirty days after the giving of such notice, whether so acknowledged or otherwise. All arrearages and sums, including taxes, which may be due and payable under this lease up to the time of its termination, as set forth in such notice, shall be paid within thirty days after such termination, and the lessee, his heirs and assigns, upon such termination, shall immediately execute and record a formal relinquishment of such lease in the office of the register of deeds of the said county of St. Louis. Such notice of termination may be delivered personally to the lessors or their legal representatives or assigns, or it may be given by registered letters mailed from any post office in the United States, postage prepaid, and addressed to the lessors, or their legal representatives or assigns, at their last known respective places of residence.

The lessors hereby further agree that the lessee, his heirs and assigns, shall have the right to assign this lease, or contract with

others to work any mine or mines which are now or may hereafter be discovered upon said lands, or subcontract or sublet the same, at his or their option, with the same rights and privileges as are herein granted to the lessee; it being expressly understood, however, that any such assignment shall not operate as a release or discharge of the lessee from the performance of the conditions of this lease until and unless the lessors shall specifically consent to said assignment in writing.

The lessee, for himself, his heirs and assigns, hereby covenants and agrees to and with the lessors that the lessee will from and after the first day of January, 1902, on or before the tenth days of January, April, July, and October in each calendar year of
168 the term covered by this lease, or during the period of time for which this contract and lease continues in force, pay to the lessors for all iron ore which shall be mined and removed from said lands during the three calendar months next preceding the first day of the month in which payment is to be made as aforesaid a royalty at and of twenty-five cents per ton for all iron ore so taken out, mined and carried away from all said lands and premises, each ton in all cases to be reckoned at 2,240 pounds.

The lessee, for himself, his heirs and assigns, hereby covenants and agrees with the lessors that from and after January 1", 1902, during each and every calendar year of the period or term of this lease, or until the surrender or assignment of the same in the manner herein provided, the lessee will mine and remove from said lands (which for all and singular the purposes of this lease shall be inseparable and considered as only one tract or parcel) at least one hundred thousand (100,000) gross tons of iron ore annually, or that he will pay to the lessors an advance royalty, which shall be treated and considered as ground rent, of twenty-five cents per gross ton on said minimum quantity each year, the same as if actually mined and removed; it being the express intention hereof that it shall be optional with the lessee either to mine, remove, and ship away iron ore from said lands during each calendar year after January 1", 1902, while this lease continues in force, or in lieu thereof to pay the lessors an advance royalty of twenty-five cents per ton on said annual minimum quantity of one hundred thousand tons, the same as if actually mined and removed.

The said obligation of the lessee to pay said advance royalty of twenty-five cents per ton upon one hundred thousand tons annually, or such ground rent of twenty-five thousand dollars, shall continue in force without regard to the quantity or quality of ore existing in the premises, during the full term of this lease or until the same is terminated and surrendered or assigned in the manner herein provided, and, in case of an assignment of this lease in the manner herein provided the obligation to mine and pay for such annual minimum quantity of ore, as well as all other provisions of this lease, shall rest upon and bind such assignee as fully as the lessee is hereby bound.

If ore is not mined and removed from said lands during any calendar year or years commencing with January 1", 1902, while this lease is in force, said advance royalties (to be considered as ground rent as aforesaid) on said annual minimum of one
109 hundred thousand tons shall be paid quarterly at the times and in the manner as hereinbefore provided for the payment of royalties for ore actually mined and shipped away; and in case mining operations are carried on and the quantity of iron ore mined and shipped away in any quarter of any calendar year is less than 25,000 tons, advance royalty shall be paid in such sum as shall, together with the amount actually paid as royalties, equal sixty-two hundred and fifty dollar' ($6,250), and in such case, such sum or amount so paid as advance royalties shall be credited in the payment of the quarterly royalty for any other quarter or quarters of said year when more than 25,000 gross tons are mined and shipped away, such credit to apply only on the excess of the minimum quantity mined and shipped during such quarter; and in case more than 25,000 gross tons are mined and shipped away in any quarter of any calendar year, upon which royalties shall be paid as hereinbefore provided, the amount of such payment in excess of $6,250.00 shall be credited in the payment of the quarterly minimum royalty upon the same for any other quarter or quarters of such year when less than 25,000 tons is mined and shipped away; it being the express intention hereof that the lessee shall not be required in and for any such calendar year to pay a greater aggregate royalty that $25,000, except and unless a greater quantity than 100,000 gross tons is mined and shipped away in such entire year, and that for all advance royalties and ground rent which shall be paid in any such calendar year and for which ore shall not be mined and shipped away, the lessee shall have the right, without further payment of royalty and free of charge, to mine and ship away ore in the manner as provided in the next succeeding paragraph hereof, that is to say:

If for any year or years of the life of this contract said lessee shall thus pay monies, either as advance royalties or ground rent, in excess of the royalty on ore actually mined and removed from said lands during such year or years, then such monies so paid in excess of the royalty on ore actually mined and removed, shall be credited and applied as payments of royalties on ore which may be mined and removed from said lands, or any thereof, during any subsequent year or years, in excess of the stipulated minimum quantity of 100,000 tons.

Provided, however, that during the first year of the life of this contract, the foregoing provisions of this contract shall be modified in this, that the minimum annual output required during said
110 first year shall be fifty thousand (50,000) gross tons instead of one hundred thousand gross tons, and the minimum royalty or ground rent required to be paid during said first year shall be twelve thousand five hundred dollars ($12,500) instead of twenty-five thousand dollars, making the minimum quarterly payments to

be made during said first year thirty-one hundred and twenty-five dollars ($3,125) instead of sixty-two hundred and fifty dollars.

The lessee, his heirs and assigns, at the time of making each of said payments, shall transmit to the lessors, their successors and assigns, an exact truthful statement of the amount of iron ore removed from said lands for the three calendar months for which payment is to be made. The iron ore so taken out by the lessee, his heirs and assigns, from said lands, shall be weighed by the railroad company transporting the same therefrom, which weights shall determine the quantity as between the parties hereto prima facie.

The lessee, his heirs and assigns, shall furnish the lessors monthly statements showing the aforesaid weight; the right is, however, hereby conceded to and reserved by the lessors, by their duly authorized agents, to inspect, view, and test the correctness of the railroad company's weights at any time and in such manner as may seem proper to adopt, it being understood that any errors in these respects, when ascertained, are to be cognizable and corrected and any such differences shall be settled and paid for at the next regular quarterly payment.

The lessee hereby covenants and agrees to conduct all its mining operations on said lands in a good, workmanlike manner and in accordance with the requirements of good engineering and so as not to do or cause or permit any unnecessary or unusual permanent injury to the same or inconvenience or hindrance in the subsequent operation of the mine or mines thereon.

The lessee shall pay all taxes and assessments, ordinary and extraordinary, general and specific, which may be levied or assessed upon the lands hereby demised and on the iron ore mined thereon and on all improvements and personal property thereon while this lease is in force, and shall furnish the lessors with duplicate tax receipts showing the payment of any such assessments or taxes: Provided, however, The lessee shall have the right to contest, in the courts or otherwise, the validity of any such taxes or assessments in case it shall deem the same unjust, unequal, or excessive, or to take such other steps or proceedings as it may deem necessary to compel
111 or secure a reduction, re-adjustment, or equalization thereof, before it shall be required hereunder to pay and discharge the same or any part thereof, and at the termination of this lease, or in case the same is surrendered in manner hereinbefore provided, the lessee further hereby agrees peaceably to surrender possession of said lands to the lessors.

The lessee further hereby covenants and agrees that, while this lease is in force and until it is surrendered or assigned in manner as herein provided, he will protect said lands and premises from all mechanic's or labor liens and keep the title to the same force and clear of all clouds or encumbrances arising therefrom in any way on account of his mining operations thereon, or the use and occupation thereof by him, his agents, servants, or employees or his contractors.

The lessors hereby expressly covenant and represent that the said leased lands are now owned in fee by them in the following proportion, to wit:

Morton Denison Hull, and undivided one-sixth interest thereof; Eudora M. Gaylord, an undivided one-sixth interest thereof; Marshall H. Alworth, an undivided one-third interest thereof; William Edward Boeing and Caroline Marie Boeing, minors (for whom Frank A. Shultz is guardian as aforesaid), each an undivided one-twelfth thereof; and Marie M. Owsley, an undivided one-sixth thereof.

The several payments required hereunder to be made shall be made at the Corn Exchange National Bank in Chicago, Illinois, or at any other bank in the city of Chicago, or elsewhere, as the lessors or their legal representatives or assigns may from time to time in writing designate, and the bank or banks so designated shall be considered and treated as the agent or agents of the lessors respectively for the purpose of receiving, collecting, and receipting for such payments. The payments provided in this lease to be made by the lessee shall be made in gold coin of the United States of the present standard, or its equivalent.

It is mutually understood and agreed that upon the termination of this lease, whether by the acts of the parties or either of them, or by expiration of the term, the lessee, his heirs or assigns, shall have sixty days in which to remove all engines, tools, machinery, railroad tracks, or structures erected or placed by it or them upon said premises, provided that all taxes, royalties, or other dues have been paid and other conditions performed, but he or they shall not remove or
112 impair any supports placed in the mine or mines nor any timber or framework necessary to the use and maintenance of shafts or the approaches to the mine or mines, or the tramways within the same, and on failure within the time above specified to so remove such property, all of the same shall belong to and become the property of the lessors or their successors in interest.

The lessors expressly reserve to themselves (and the lessee hereby assents thereto) the right, by their duly authorized agents, to enter into or upon said leased lands, mines, and premises at any time or times to inspect and survey the same and to measure the quantity of ore which shall have been mined and removed therefrom, not unnecessarily or unreasonably hindering or interrupting the operations of the lessee.

This lease is upon the express condition that if such royalty or any part thereof be and remain unpaid after the days and times above specified, and if the same remain in default for a period of sixty days, or in case the lessee fails to keep any of the covenants or conditions herein expressed to be kept and performed by him, and which failure shall continue for sixty days after receiving written notice from the lessors specifying the default, neglect, or failure complained of, then and from thence forth, and in either of these events, but not otherwise, it shall be lawful for the lessors at their option to take possession of said leased lands with or without any previous process whatever, to re-enter and have and possess the same again as fully as if no lease had been given to the lessee, and he and all parties claiming under him shall be wholly excluded therefrom, and the lessors hereby reserve and shall at all times have, possess, and hold a lien upon all ore mined and upon all improvements made upon said lands and premises by the lessee for unpaid balances hereunder.

In case other ores or minerals are discovered and mined on said lands by said lessee, he being hereby expressly granted the right to mine and remove the same, the royalty thereon shall be thirty-three (33) per centum of the market value or selling price of all such ores or minerals at the markets therefor, less all transportation charges which shall first be deducted from such market value or selling price and retained by the lessee, and such royalty shall be due and payable at the same times and in the same manner that the royalty on the iron ore shall be due and payable, and quarterly reports of the
113 quality, grade, kind, and quantity of such ores and minerals shall be made at the same times and in the same manner that the iron ore reports are required to be made hereunder.

The covenants, terms, and conditions of this lease shall run with the land and be in all respects binding and operative upon the heirs, legal representatives, and assigns of the lessors and the successor or successors of said guardian, and upon the successors, heirs, and assign of the lessee.

In witness whereof the parties hereto have hereunto set their hands and seals the day and year first above written.

(Signed) MORTON DENISON HULL. [SEAL.]
(Signed) KATHARINE B. HULL. [SEAL.]

Signed, sealed, and delivered in presence of—
(Signed) R. H. WALTER,
(Signed) JOHN A. VERHOEVEN,
As to Morton Denison Hull and wife.

(Signed) EUDORA M. GAYLORD. [SEAL.]
(Signed) EDWARD L. GAYLORD. [SEAL.]
(Signed) R. H. WALTER,
(Signed) JOHN A. VERHOEVEN,
As to Eudora M. Gaylord and husband.

(Signed) MARIE M. OWSLEY. [SEAL.]
(Signed) FREDERICK D. OWSLEY. [SEAL.]
(Signed) HENRIETTA E. OWSLEY,
(Signed) HANNAH NICHOLSON,
As to Marie M. Owsley and husband.

(Signed) MARSHALL H. ALWORTH. [SEAL.]
(Signed) NELLIE ALWORTH. [SEAL.]
(Signed) GEORGE E. GIBSON,
(Signed) FRANK W. HEIMICK,
As to Marshall H. Alworth & Wife.

(Signed) FRANK A. SCHULTE, [SEAL.]
As Guardian of William Edward Boeing and Caroline Marie Boeing, Minors.
(Signed) JNO. B. SEVALD,
(Signed) RICHARD G. LAMRBECHT,
As to Frank A. Schulte, Guardian.

(Signed) WILLIAM H. COLE. [SEAL.]
(Signed) J. S. WASHBURN,
(Signed) M. B. HAUGEN,
As to W. H. C.

114 STATE OF ILLINOIS,
County of Cook, ss:

On this 13th day of December, 1901, before me, a notary public within and for said county, personally appeared Morton Denison Hull and Katharine B. Hull, his wife, to me well known to be the same persons described in and who executed the foregoing instrument, and they acknowledged that they executed the same as their free act and deed.

[NOTARIAL SEAL.] (Signed) JOHN A. VERHOEVEN,
Notary Public, Cook County, Ill.

STATE OF ILLINOIS,
County of Cook, ss:

On this 13th day of December, 1901, before me, a notary public within and for said county, personally appeared Eudora M. Gaylord and Edward L. Gaylord, her husband, to me well known to be the same persons described in and who executed the foregoing instrument, and they acknowledged that they executed the same as their free act and deed.

[NOTARIAL SEAL.] (Signed) JOHN A. VERHOEVEN,
Notary Public, Cook County, Ill.

STATE OF VIRGINIA,
County of Albemarle, ss:

On this 18th day of December, 1901, before me, a notary public within and for said county, personally appeared Marie M. Owsley and Frederick D. Owsley, her husband, to me well known to be the same persons described in and who executed the foregoing instrument, and they acknowledged that they executed the same as their free act and deed.

[NOTARIAL SEAL.] (Signed) W. L. WALLACE,
Notary Public, Albermarle County, Va.

115 STATE OF MINNESOTA,
County of St. Louis, ss:

On this 23rd day of December, 1901, before me, a notary public within and for said county, personally appeared Marshall H. Alworth and Nellie Alworth, his wife, to me well known to be the same persons described in and who executed the foregoing instrument, and they acknowledged that they executed the same as their free act and deed.

[NOTARIAL SEAL.] (Signed) FRANK W. HEIMICK,
Notary Public, St. Louis Co., Minn.

STATE OF MICHIGAN,
County of Wayne, ss:

On this 3rd day of February, 1902, before me, a notary public within and for said county, personally appeared Frank A. Schulte, to me known to be the person described in and who executed the foregoing instrument and lease and upon oath acknowledged that he is the only lawful acting guardian of said William Edward Boeing and

Caroline Marie Boeing, minors, and that as such guardian he executed the foregoing instrument in behalf of said minors with full authority so to do and by order of the probate court of St. Louis County, Minnesota, and he acknowledged the same to be his free act and deed individually and as guardian as aforesaid, and the free act and deed of said William Edward Boeing and Caroline Marie Boeing.

[NOTARIAL SEAL.] (Seal) JNO. B. SEVALD,
Notary Public, Wayne Co., Mich.

STATE OF MINNESOTA,
County of St. Louis, ss:

On this first day of February, 1902, before me, a notary public within and for said county, personally appeared William H. Cole, to me well known to be the same person described in and who executed the foregoing instrument, and he acknowledged that he executed the same as his free act and deed.

[NOTARIAL SEAL.] (Signed) J. L. WASHBURN,
Notary Public, St. Louis Co., Minn.

116 *Plaintiff's Exhibit E*

This indenture, made the first day of July, in the year of our Lord one thousand nine hundred and two, by and between Morton Dension Hull and Katharine B. Hull, his wife, Eudora Hull Gaylord, formerly Eudora M. Hull, and Edward L. Gaylord, her husband, all of Chicago, Illinois, Marie M. Owsley, formerly Marie M. Boeing, and Frederick D. Owsley, her husband, of Greenwood, Albemarle County, Virginia; Marshall H. Alworth and Nellie Alworth, his wife, of Duluth, Minnesota; and Frank A. Schulte, of Detroit, Michigan, as guardian of William Edward Boeing and Caroline Marie Boeing, minors, as parties of the first part, hereinafter designated as the "lessors," and Louis W. Hill, of St. Paul, Minnesota, as party of the second part, hereinafter designated as the "lessee."

Witnesseth that the lessors, for and in consideration of the sum of one dollar, and other valuable considerations to them in hand paid by the lessee, the receipt whereof is hereby acknowledged, and in further consideration of the convenants, promises, and conditions hereinafter contained, to be kept and performed by the lessee, do hereby lease and demise unto the said lessee, his heirs and assigns, for a term of fifty (50) years from and after July 1, 1902, as to an undivided five-sixths interest in and to the lands hereinafter described, now owned as tenants in common by the lessors, other than said guardian, and for a term of twenty-five years from and after said July 1, 1902, as to the remaining undivided one-sixth thereof now held and owned as tenants in common by the said minors William Edward Boeing and Caroline Marie Boeing, of which interests the said Frank A. Schulte as the duly qualified and acting guardian of said minors, is the lessor, the following described lands situated in the county of St. Louis and State of Minnesota, to wit:

The north half of the northeast quarter and the southwest quarter of the northeast quarter of section six (6) in township fifty-seven (57) north, of range twenty (20) west of the forth principal meridian, subject to any rights of way as evidenced by instruments of record, through, over or across any parcel or parcels thereof, heretofore granted to the Duluth, Missabe & Northern Railway Company and the Duluth, Mississippi River & Northern Railway Company.

117 Said lands are hereby leased by the lessors to the lessee for the purpose of exploring for and mining and taking out and removing therefrom the merchantable iron ore (as well as other minerals as hereinafter provided for), which is or which hereafter may be found on, in or under the said lands, together with the right to construct all buildings and to make all excavations, openings, ditches, drains, railroads, wagon roads, and all other improvements upon the said lands and premises which are or may become necessary or suitable for the mining or removal of iron ore therefrom, and the carrying on of mining operations thereon, and together with the right, during the continuance of this lease, to cut and use all the timber, other than pine, which may be upon said lands, free and without charge, so far as may be necessary for fuel and in the construction of buildings required in the operation of any mine or mines upon said lands, and for drains, tram-ways, supports or shafts of or within any such mine or mines, or in connecting the same with any line or lines of railroad over or upon which said ore may be transported.

Provided, however, that the lessee, his heirs and assigns, shall have the right at any time upon thirty (30) days notice, to terminate this agreement and lease, in so far as it requires the lessee to mine ore upon said lands or pay royalty therefor, or pay taxes thereon, by giving writ'en notice in manner as hereinafter provided to the lessors, or their legal representatives, or their assigns, who shall in such case acknowledge in writing the receipt of such notice, and by paying all arrearages and sums, including taxes, which may be due and payable under this lease up to the time of its termination, as set forth in said notice, and upon the execution and recording of a formal relinquishment of such lease in the office of the register of deeds of said county of St. Louis, so as to effectually surrender all rights thereunder, whereupon such lease shall terminate in thirty day after the giving of such notice. Such notice of termination may be delivered personally to the lessors, their legal representatives or assigns, or may be given by registered letters mailed from any post office in the United States, postage prepaid, and addressed to the lessors or their legal representatives or assigns at their last known place of residence.

The lessors hereby further agree that the lessee, his heirs and assigns, shall have the right to assign this lease or contract

118 with others to work any mine or mines which are now or may hereinafter be discovered upon said lands, or subcontract of

sublet the same at his or their option, with the same rights and privileges as are herein granted to the lessee; it being expressly understood, however, that any such assignment shall not operate as a release or discharge of the lessee from the performance of the conditions of this lease, until or unless the lessors shall specifically consent to such asignment in writing.

The lessee, for himself, his heirs and assigns, hereby covenants and agrees to and with the lessors, that from and after October 1″, 1902, during each and every calendar year of the period or term of this lease, or until the surrender or assignment of the same in the manner hereinafter provided, the lessee will mine and remove from the said lands, at least one hundred and fifty thousand (150,000) gross tons of iron ore annually, or that he will pay to the lessors an advance royalty, which shall be treated and considered as ground rent, of twenty-five cents per gross ton on said minimum quantity each year, the same as if actually mined and removed; it being the express intention hereof that it shall be optional with the lessee either to mine, remove, and ship away iron ore from said lands during each calendar year after October 1″, 1902, while this lease continues in force, or in lieu thereof to pay the lessors an advance royalty of twenty-five cents per ton on said annual minimum quantity of 150,000 tons, the same as if actually mined and removed. The said obligation of the lessee to pay said advance royalty of twenty-five cents per ton upon said 150,000 tons annually, or such ground rent of thirty-seven thousand five hundred dollars ($37,500), shall continue in force without regard to the quantity or quality of ore existing in the said premises, during the full term of this lease, or until the same is terminated, surrendered, or assigned in the manner herein provided, and in case of an assignment of this lease in the manner herein provided, the obligation to mine or pay for such minimum annual quantity of ore, as well as all other provisions of this lease, shall rest upon and bind the said assignee as fully as the lessee is hereby bound, to-wit from October 1″, 1902, up to and including the 30″ day of September, 1903, the minimum amount of ore to be thus mined and removed, shall be one hundred thousand (100,000) tons, or in lieu thereof the minimum amount of advance royalty or ground rent to be paid in case such quantity of ore is not mined, shall be twenty-five thousand dollars (25,000).

119 The royalty upon ore to be mined and removed from said premises, as above provided, shall be paid quarterly on or before the tenth day of the months of January, April, July and October of each and every year, for all of the ore so mined and removed during the three months next preceding the month in which such payments are to be made, and in case during any quarterly period of this lease no ore is mined, or in case ore is not mined in sufficient quantities so that the royalty thereon during each quarter, at the rate above specified shall for the year extending from October 1″, 1902, up to and including the 30″ day

of September, 1903, amount to six thousand two hundred and fifty dollars ($6,250), and for each quarter during each and every year thereafter, during the period of this lease, amount to nine thousand three hundred and seventy-five dollars ($9,375), then and in such case the advance royalty or ground rent hereinbefore agreed to be paid, or a sufficient sum, together with the amount paid upon the ore actually mined and removed, to equal such sums, shall be paid at the quarterly dates above specified; it being the intention of this lease that while the lessee shall be required to pay for all of the ore mined and removed from said premises during each and every year of this lease, at the rate of royalty above specified and at the dates above specified, he shall not be required to pay more than the sum of thirty-seven thousand five hundred dollars ($37,500) either as royalty or advance royalty, during any year when less than 150,000 tons of ore is mined and removed from said premises, and therefore that in case more ore is thus paid for on account of any quarter of any calendar year during the term of this lease than is mined and removed from said premises during such quarter, the same may be mined and removed during any subsequent quarter or said year without further payment, after the minimum amount for such subsequent quarter has been mined and removed, and in case ore is mined, removed, and paid for during any quarter of any calendar year in excess of the minimum quantity required for such quarter, such excess payment may be applied upon the minimum royalty to be paid for in any subsequent quarter of such year when less than the minimum quantity is mined and removed; and if for any year or years during the life of this lease the lessee shall thus pay monies, either as advance royalties or ground rent, in excess of the royalty on ore actually mined and removed
120 from said lands during such year or years, then such monies so paid in excess of the royalty on ores actually mined and removed, shall be credited and applied as payments of royalty on ore which may be mined and removed from said lands during any subsequent year or years in excess of the stipulated minimum quantity of 150,000 tons.

It is the intention of the parties hereto that in the adjustment of royalties and advance royalties under this lease, that the quarter of the current year ending December 31", 1902, shall be adjusted as a fractional portion of a year, to the end that thereafter the years as specified in this contract shall be calendar years.

The lessee, his heirs or assigns, at the time of making each of said payments, shall transmit to the lessors, their legal representatives or assigns, an exact, truthful statement of the amount of iron ore removed from said lands for the three calendar months for which said payment is made. The iron ore so taken out by the said lessee, his heirs or assigns, from said lands, shall be weighed by the railroad company transporting the same therefrom, which weights shall determine the quantities as between the parties hereto prima facie.

The lessee, his heirs or assigns, shall furnish the lessors monthly statements showing the aforesaid weight; the right, however, is hereby conceded to and reserved by the lessors, by their duly authorised agents, to inspect, view, and test the correctness of the railroad company's weights at any time, in such manner as may seem proper to adopt; it being understood that any errors in these respects, when ascertained, are to be cognizable and corrected, and any such differences shall be settled and paid for at the next regular quarterly payment.

The lessee hereby covenants and agrees to conduct all his mining operations on said lands in a good, workmanlike manner and in accordance with the requirements of good engineering, and so as not to do or cause or permit any unnecessary or unusual permanent injury to the same or inconvenience or hindrance in the subsequent operation of the mine or mines thereon.

The lessee shall pay all taxes and assessments, ordinary and extraordinary, general and specific, which may be levied or assessed upon the lands demised hereby, and on the iron ore mined thereon, and on all improvements and personal property thereon while this lease is in force and shall furnish the lessors with duplicate tax receipts showing the payment of any such assessments or taxes;

provided, however, that the lessee, shall always have the
121 right to contest, in the courts or otherwise, the validity of such taxes or assessments, in case he shall deem the same unjust, unequal, or excessive, or to take such other steps or proceedings as he may deem necessary to compel or secure a reduction, readjustment, or equalization thereof before he shall be required hereunder to pay and discharge the same or any part thereof, and at the termination of this lease, or in case the same is surrendered in manner as hereinbefore provided, the lessee further hereby agrees peacefully to surrender possession of said lands to the lessors.

The lessee further hereby covenants and agrees that, while this lease is in force and until it is surrendered or assigned, in manner as herein provided, he will protect said lands and premises from all mechanic's or labor liens, and keep the title to the same free and clear of all clouds or incumbrances arising therefrom in any way on account of his mining operations thereon, or the suse and occupation thereof by him, his heirs or assigns, servants, or employees, or contractors.

The lessors hereby each for himself but not for the others, expressly covenant and represent that the said leased lands are now owned by them in fee in the following proportions, to wit:

Morton Denison Hull, an undivided one-sixth interest thereof; Eudora Hull Gaylord, an undivided one-sixth interest thereof; Marie M. Owsley, an undivided one-sixth interest thereof; Marshall H. Alworth, an undivided one-third interest thereof; and William Edward Boeing and Caroline Marie Boeing, minors (for whom said Frank A. Schulte is guardian as aforesaid), each an undivided one-twelfth interest thereof.

And they do hereby covenant with said lessee that the said premises are free and clear from all incumbrances, and that the lessee, in the quiet and peaceful possession of said premises, and each and every part thereof, during the term aforesaid, or until the termination of this lease, they will and do hereby warrant and defend; provided that the said lessee shall keep, observe, and perform each and every of the covenants, terms, agreements, and conditions in this indenture, on the part of the said lessee made, or to be kept, observed, and performed.

The several payments required hereunder to be made shall be made at the Corn Exchange National Bank, of Chicago, Illinois, or at any other bank in the said city of Chicago, or elsewhere, as the lessors or their legal representatives or assigns may from time to time in writing designate, and the bank or banks so designated shall be considered and treated as the agent or agents of the lessors,
122 respectively, for the purpose of receiving, collecting, and receipting for such payments. The payments provided in this lease to be made by the lessee shall be made in gold coin of the United States of the present standard, or its equivalent.

It is mutually understood and agreed that upon the termination of this lease, whether by the act of the parties, or either of them, or by expiration of the term, the lessee, his heirs or assigns, shall have 60 days in which to remove all engines, tools, machinery, railroad tracks, or structures erected or placed by him, or them, upon said premises; provided that all taxes, royalties, and other dues shall have been paid and other conditions performed; but he or they shall not remove or impair any supports placed in any mine or mines nor any timber nor framework necessary to the use or maintenance of the shafts or the approaches to the mine or mines or the tramways within the same, and on failure within the time above specified to so remove such property, all of the same shall belong to and become the property of the lessors, or their successors in interest.

The lessors expressly reserve to themselves (and the lessee hereby assents thereto) the right by their duly authorized agents to enter into or upon the leased lands, mines, and premises at any time or times to inspect or survey the same and to measure the quantity of ore which shall have been mined or removed therefrom, not unnecessarily nor unreasonably hindering or interrupting the operations of the lessee.

This lease is upon the express condition that if such royalty or any part thereof be and remain unpaid after the days and times above specified and if the same remain in default for a period of 60 days, or in case the lessee fails to keep any of the covenants or conditions herein expressed to be kept and performed by him, and such failure shall continue for 60 days after receiving written notice from the lessors specifying the default, neglect, and failure complained of, then and from thenceforth and in either of those events, but not otherwise, it shall be lawful for the lessors, at their option, to take

possession of said leased lands with or without any previous process whatever, to reenter and have and possess the same again as fully as if no lease had been given to the lessee, and he and all parties claiming under him shall be wholly excluded therefrom and the lessors hereby reserve and shall at all times have, possess, and hold a lien upon all ore mined and upon all improvements made upon said lands and premises by the lessee for unpaid balances hereunder.

In case other ores or minerals are discovered and mined
123 on said lands by the lessee, he being hereby expressly granted the right to mine and remove the same, the royalty thereon shall be thirty-three per centum of the market value or selling price of all such ores or minerals, at the market or markets therefor less all transportation charges which shall be first deducted from such market value, or selling price and retained by the lessee, and such royalty shall be due and payable at the same times and in the same manner that the royalty on the iron ore shall be due and payable, and quarterly reports of the quality, grade, kind, and quantity of such ores or minerals shall be made at the same times and in the same manner that the iron ore reports are required to be made hereunder.

The covenants, terms, and conditions of this lease shall run with the land and be in all respects binding and operative upon the heirs, legal representatives, and assigns of the lessors and the successor or successors of said guardian and upon the heirs and assigns of the said lessee.

It is further agreed between the parties hereto, as one of the conditions of this lease, that for and on account of services heretofore rendered and rights existing with respect to the procurement of the execution of this lease, that, in addition to the rents and royalties hereinbefore agreed to be paid by the lessee to the lessors, the said lessee agrees to pay to one Richard Webb and one Richard J. Mitchell, the sum of $14,500, in manner and form following, that is to say: That when and as often as royalties become due and payable under the terms of this lease from the lessee to the lessors, whether the same be royalties upon ore actually mined and removed or minimum royalties as herein agreed to be paid, the said lessee shall pay to the said Webb the sum of one and one-quarter cents per ton and to the said Mitchell the sum of one and one-quarter cents per ton, at the quarterly dates hereinbefore specified, upon all of the ore paid for by the said lessee to the said lessors in and by the payment of the quarterly rents or royalties as hereinbefore agreed to be paid annually, until the sum of $7,250 is thus paid to said Webb and a like sum of $7,250 is thus paid to said Mitchell, aggregating the said sum of $14,500, and when such payments so made aggregate such sum, then this provision of this lease and contract shall be and become terminated and satisfied and the said Webb and said Mitchell shall in such case acknowledge the same in writing, in such manner that the same may be made a matter of record. And it is further

agreed that any default in the making of such payments, shall
124 constitute a default in the terms and conditions of this lease, with like consequences to the lessee and with like rights and powers to the lessors as are provided herein for any other default on the part of the lessee, it being expressly herein agreed that the lessors shall have the right and power to enforce the performance of this provision of this contract in behalf of said Webb and said Mitchell.

In testimony whereof, the said parties to said lease have hereunto set their hands and seals the day and year first above written.

Signed, sealed, and delivered in presence of—

(Signed) RICHARD E. DOOLEY,
(Signed) JOHN A. VERHOEVEN,
As to Morton Denison Hull and Katharine B. Hull.

(Signed) MORTON DENISON HULL. [SEAL.]
(Signed) KATHERINE B. HULL. [SEAL.]
(Signed) EUDORA HULL GAYLORD. [SEAL.]
(Signed) EDWARD L. GAYLORD. [SEAL.]

(Signed) RICHARD F. DOOLEY,
(Signed) JOHN A. VERHOEVEN,
As to Eudora H. Gaylord and Edward L. Gaylord.

(Signed) MARIE M. OWSLEY. [SEAL.]
(Signed) FREDERIC D. OWSLEY. [SEAL.]

(Signed) MARY AGNES BRUCE,
(Signed) J. D. RAY,
As to Marie M. Owsley and Frederick D. Owsley.

(Signed) MARSHALL H. ALWORTH. [SEAL.]
(Signed) NELLIE ALWORTH. [SEAL.]

(Signed) F. W. HEIMICK,
(Signed) EDGAR C. SMITH,
As to Marshall H. Alworth and Nellie Alworth.

(Signed) FRANK A. SCHULTE, [SEAL.]
Guardian of William E. and Caroline M. Boeing, Minors.

(Signed) J. T. KEENA,
(Signed) RICHARD G. LAMBRECHT,
As to Frank A. Schulte, Guardian.

(Signed) LOUIS W. HILL. [SEAL.]

(Signed) JOHN G. WILLIAMS,
(Signed) J. H. GRUBER,
As to Louis W. Hill.

125 STATE OF ILLINOIS,
County of Cook, ss:

On this 12th day of August, 1902, before me, a notary public within and for said county, personally appeared Morton Denison Hull and Katharine B. Hull, his wife, and Eudora Hull Gaylord and Edward L. Gaylord, her husband, to me well known to be the same persons described in and who executed the foregoing instrument, and they acknowledged that they executed the same as their free act and deed.

[NOTARIAL SEAL.] (Signed) JOHN A. VERHOEVEN,
Notary Public, Cook Co., Illinois.

STATE OF VIRGINIA,
County of Albemarle, ss:

On this 15th day of August, 1902, before me, a notary public within and for said county, personally appeared Marie M. Owsley and Frederick D. Owsley, her husband, to me well known to be the same persons described in and who executed the foregoing instrument, and they acknowledged that they executed the same as their free act and deed.

[NOTARIAL SEAL.] (Signed) W. L. WALLACE,
Notary Public, Albemarle Co., Va.

STATE OF MINNESOTA,
County of St. Louis:

On this 23rd day of August, 1902, before me, a notary public within and for said county, personally appeared Marshall H. Alworth and Nellie Alworth, his wife, to me well known to be the same persons described in and who executed the foregoing instrument, and they acknowledged that they executed the same as their free act and deed.

[NOTARIAL SEAL.] (Signed) FRANK W. HEIMICK,
Notary Public, St. Louis Co., Minn.

126 STATE OF MICHIGAN,
County of Wayne, ss:

On this 20th day of August, 1902, before me, a notary public within and for said county, personally appeared Frank A. Schulte, to me known to be the same person described in and who executed the foregoing instrument, and upon oath acknowledged that he is the only lawful and acting guardian of said William Edward Boeing and Caroline Marie Boeing, minors, and that as such guardian he executed the foregoing instrument in behalf of said minors with full authority so to do and by order of the probate court of St. Louis County, Minnesota, and he acknowledged the same to be his free act and deed, individually and as guardian aforesaid, and the free act and deed of said William Edward Boeing and Caroline Marie Boeing.

[NOTARIAL SEAL.] (Signed) J. T. KEENA,
Notary Public, Wayne County, Mich.

STATE OF MINNESOTA,
County of St. Louis, ss:

On this 25th day of August, 1902, before me, a notary public within and for said county, personally appeared Louis W. Hill, to me well known to be the same person described in and who executed the foregoing instrument, and he acknowledged that he executed the same as his free act and deed.

[NOTARIAL SEAL.] (Signed) J. H. GRUBER,
Notary Public, St. Louis Co., Minn.

127 *Plaintiff's Exhibit F*

This indenture, made this first day of October in the year of our Lord one thousand nine hundred and two, between Morton Denison Hull and Katharine B. Hull, his wife, Eudora Hull Gaylord, formerly Eudora M. Hull, and Edward L. Gaylord, her husband, all of Chicago, Illinois; Marie M. Owsley, formerly Marie M. Boeing, and Frederick D. Owsley, her husband, of Greenwood, Albermarle County, Virginia; Marshall H. Alworth and Nellie Alworth, his wife, of Duluth, Minnesota, William Edward Boeing, unmarried, and Caroline Marie Boeing, unmarried, both of Greenwood, Albermarle County, Virginia, as parties of the first part, hereinafter called the "lessors," and Louis W. Hill, of St. Paul, Minnesota, party of the second part, hereinafter called the "lessee."

Witnesseth that the lessors, for and in consideration of the sum of one dollar and other valuable considerations to them in hand paid by the lessee, the receipt of which is hereby acknowledged, and in further consideration of the covenants, terms, and conditions hereinafter contained, to be kept and performed by the lessee, do hereby let, lease, and demise unto the lessee, his heirs and assigns, for a term of fifty (50) years from and after January 1, 1903, the following described lands and premises situated in the county of St. Louis and State of Minnesota, to wit:

The southwest quarter of the southwest quarter, also known as lot three (3), of section twenty-two (22) in township fifty-eight (58) north, of range twenty (20) west, subject to the rights of the Swan River Logging Company, or its successors in interest, to occupy the surface of said premises for a period of ten years from January 10, 1900, under the terms and conditions of a certain agreement made between the lessors herein as parties of the first part and the said Swan River Logging Company as party of the second part, dated January 10, 1900, reference to which is hereby made, and subject to any railroad rights of way now of record.

Said lands are hereby leased by the lessors to the lessee for the purpose of exploring for, mining, taking out, and removing therefrom the merchantable iron ore (as well as other minerals as hereinafter provided for), which is or which hereafter may be found on, in or under the said lands, together with the right to construct all

buildings, make all excavations, openings, ditches, drains,
128 railroads, wagon roads, and all other improvements upon said lands and premises which are or may become necessary or suitable for the mining or removal of the iron ore therefrom and the carrying on of mining operations thereon, and together with the right, during the continuance of this lease, to cut and use all the timber, other than pine, which may be upon said lands, free and without charge, so far as may be necessary for fuel and in the construction of buildings required in the operation of any mine or mines upon said lands, and for drains, tramways, supports or shafts of or within any such mine or mines, or in connecting the same with any line or lines of railroad over or upon which the said ore may be transported, such pine timber, with the right to cut and remove the same, being expressly reserved from the operation of this lease.

The term "merchantable iron ore" as used in this lease shall be taken to mean such ore as shall be merchantable from time to time as the work of mining progresses.

Provided, however, that the lessee, his heirs or assigns, shall have the right at any time, upon thirty (30) days notice to terminate this agreement and lease in so far as it requires the lessee to mine ore on said lands or to pay royalty therefor or to pay taxes thereon, by giving written notice in the manner as hereinafter provided, to the lessors or their legal representatives or assigns, who shall in such case acknowledge in writing the receipt of such notice, and upon the execution and delivery to the said lessors of an instrument in form and substance sufficient to relinquish this lease and all rights thereunder, executed in such manner as to be entitled to record in the office of the register of deeds of said St. Louis County, and the payment of all arrearages and sums, including taxes which may be due and payable under this lease up to the time of its termination, as set forth in said notice, then and thereupon this lease shall be and become terminated. Such notice of termination may be delivered personally to the lessors or their legal representatives or assigns, or may be given by registered letters mailed from any post office in the United States, postage prepaid, and addressed to the lessors, their legal representatives or assigns, at their last known places of residence.

The lessors hereby further agree that the lessee, his heirs and assigns, shall have the right to assign this lease, or to contract with others to work any mine or mines which are now or may hereafter be discovered upon said lands, or sub-contract or sub-let the same at
his or their option, with the same rights and privileges as are
129 herein granted to the lessee; it being expressly understood however, that any such assignment shall not operate as a release or discharge of the lessee from the performance of the conditions of this lease, until or unless the lessors shall specifically consent to such assignment in writing.

The lessee, for himself, his heirs and assigns, hereby further covenants and agrees with the lessors that from and after January

1, 1903, during each and every calendar year of the period or term of this lease, or until the surrender or assignment of the same in the manner herein provided, the lessee will mine and remove from said lands at least fifty thousand (50,000) gross tons of iron ore annually, or that he will pay to the lessors an advance royalty which shall be treated as ground rent, of twenty-five cents per gross ton on said minimum annual quantity each year, the same as if actually mined and removed; it being the express intention hereof that it shall be optional with the lessee either to remove and ship away iron ore from said lands during each calendar year while this lease continues in force, or in lieu thereof to pay the lessors an advance royalty of twenty-five cents per gross ton on said annual minimum quantity as herein provided, the same as if such ore were actually mined and removed. The said obligation of the lessee to pay said advance royalty of twenty-five cents per gross ton upon said minimum annual quantity, as herein provided, or such ground rent of twelve thousand five hundred dollars ($12,500) for each year, shall continue in force without regard to the quantity or quality of the ore existing in the premises, during the full term of this lease, or until the same is terminated, surrendered or assigned in the manner herein provided; and in case of an assignment of this lease in the manner herein provided, the obligation to mine or pay for such minimum annual quantity of ore, as well as all other obligations of this lease, shall rest upon and bind such assignee as fully as the lessee is hereby bound.

The lessee further covenants and agrees that the payments of said royalty of twenty-five cents per gross ton upon all ore mined and removed from said premises during the term of this lease, shall be made on or before the 15th days of January, April, July, and October in each year for all of the iron ore mined and removed from said premises during the three months next preceding the first day of the month in which such payments are to be made. And the lessee further covenants that the payments of ground rent or minimum royalty hereinbefore provided to be made, shall likewise be paid quarterly at the same dates hereinbefore specified for the payment of royalty upon ore actually mined and removed from said premises.

If in any quarter year the lessee shall ship less than one quarter of the agreed minimum output for that year and in a subsequent quarter of such year shall ship more than the agreed minimum output for such subsequent quarter, the lessee in making payment of the royalty upon such excess, shall be entitled to credit at the rate of twenty-five cents per ton up to the amount of royalty previously paid on ore not shipped, and shall likewise in any quarter year when less than the agreed minimum output for such quarter shall be mined and removed, in making payment of the minimum royalty for such quarter, be entitled to credit at the rate above specified for the

excess of royalty paid over and above the agreed minimum for all preceding quarters of such year, to the end that the royalties for the several quarters of each year shall be adjusted so that the lessee shall not be required to pay royalty upon more than the annual minimum output hereinbefore specified, unless he shall during such year mine and remove from said premises more than said annual minimum quantity.

If for any year or years of the life of this lease the lessee shall thus pay monies, either as advance royalties or ground rent, in excess of the royalty on ore actually mined and removed from said lands during such year or years, then such monies so paid in excess of royalties on ore actually mined and removed, shall be applied as payments of royalties on ore mined and removed from said lands during any subsequent year or years in excess of the stipulated minimum quantity for such year.

The lessee, its heirs and assigns, at the time of making each of such payments, shall transmit to the lessors, their legal representatives or assigns, an exact and truthful statement of the amount of iron ore removed from said lands during the three calendar months for which such payment is to be made. The iron ore so taken out by the lessee, his heirs or assigns, from said lands, shall be weighed by the railroad company transporting the same therefrom, which weights shall determine the quantity as between the parties hereto, prima facie.

The lessee, his successors and assigns, shall furnish the lessors monthly statements showing the aforesaid weights; the right is hereby, however, conceded to and reserved by the lessors, by
131 their duly authorized agents, to inspect, view, and test the correctness of the railroad company's weights at any time and in such manner as may seem proper to adopt; it being understood that any errors in these respects, when ascertained, are to be cognizable and corrected and any such differences shall be settled and paid for at the next regular quarterly payment.

The lessee hereby covenants to conduct all its mining operations on said lands in a good, workmanlike manner and in accordance with the requirements of good engineering and so as not to do, cause, or permit any unnecessary or unusual permanent injury to the same, or inconvenience or hindrance in the subsequent operation of the mine or mines thereon.

The lessee shall pay all taxes and assessments, ordinary and extraordinary, general and specific, which may be levied or assessed upon the lands demised hereby and on the iron ore mined thereon, and on all improvements and personal property thereon, while this lease is in force, and shall furnish the lessors with duplicate tax receipts showing the payment of any such assessments or taxes; provided, however, that the lessee shall always have the right to

contest in the courts or otherwise, the validity of any such taxes or assessments in case he shall deem the same unjust, unequal, or excessive, or to take such other steps or proceedings as he may deem necessary to compel or secure a reduction, readjustment, or equalization thereof, before he shall be required hereunder to pay and discharge the same, or any part thereof, and at the termination of this lease, or in case the same is surrendered in manner as hereinbefore provided, the lessee further hereby agrees peaceably to surrender possession of the said lands to the lessors.

The lessee further hereby convenants and agrees that, while this lease is in force and until it is surrendered or assigned in the manner as herein provided, he will protect said lands and premises from all mechanics' or labor liens and keep the title to the same free and clear of all clouds or incumbrances arising therefrom in any way on account of his mining operations thereon or the use and occupation thereof by him, his agents, servants or employees or his contractors.

The lessors hereby expressly covenant and represent that the said leased lands are now owned by them in fee in the following proportions, to wit:

Morton Denison Hull, an undivided one-sixth interest thereof;
Eudora Hull Gaylord, an undivided one-sixth interest thereof;
Marie M. Owsley, an undivided one-sixth interest thereof;
132 Marshall H. Alworth, an undivided one-third interest thereof;
William Edward Boeing, an undivided one-twelfth interest thereof; and Caroline Marie Boeing, an undivided one-twelfth interest thereof.

The several payments required hereunder to be made shall be made at the American National Bank in Chicago, Illinois, or at any other bank in the city of Chicago or elsewhere as the lessors or their legal representatives or assigns may from time to time in writing designate, and the bank or banks so designated shall be considered and treated as the agent or agents of the lessors, respectively, for the purpose of receiving, collecting, and receipting for such payments. The payments provided in this lease to be made by the lessee shall be made in gold coin of the United States of the present standard, or its equivalent.

It is mutually understood and agreed that upon the termination of this lease, whether by the acts of the parties or either of them, or by expiration of the term, the lessee, his heirs or assigns, shall have sixty days in which to remove all engines, tools, machinery, railroad tracks or structures erected or placed by him or them upon said premises, provided that all taxes, royalties, and other dues shall have been paid and other conditions performed; but he or they shall not remove or impair any supports placed in the mine or mines, or any timber or frame work necessary to the use or maintenance of the

shafts or the approaches to the mine or mines, or the tramways within the same, and on failure within the time above specified to so remove such property, all of the same shall belong to and become the property of the lessors or their successors in interest.

The lessors expressly reserve to themselves (and the lessee hereby assent thereto) the right, by their duly authorized agents, to enter into or upon the said leased lands, mines, and premises, at any time or times to inspect and survey the same and to measure the quantity of ore which shall have been mined or removed therefrom, not unnecessarily or unreasonably hindering or interrupting the operations of the lessee.

This lease is upon the express condition that if such royalty, or any part thereof, be and remain unpaid after the days and times above specified, and if the same remain in default for a period of sixty days, or in case the lessee fails to keep any of the covenants or conditions herein expressed to be kept and performed by him, and such failure shall continue for sixty days after receiving written notice from the lessors specifying the default, neglect, and
133 failure complained thereof, then and from thenceforth and in either of these events, but not otherwise, it shall be lawful for the lessors at their option to take possession of said leased lands, with or without any previous process whatever, to re-enter and have and possess the same again as fully as if no lease had been given to the lessee, and he and all parties claiming under him shall be wholly excluded therefrom, and the lessors hereby reserve and shall at all times have, possess, and hold a lien upon all ore mined and upon all improvements made upon said lands and premises by the lessee for unpaid balances hereunder.

In case other ores or minerals are discovered and mined on said lands by the lessee, he being hereby expressly granted the right to mine and remove the same, the royalty thereon shall be thirty-three per centum of the market value or selling price of all such ores or minerals at the market or markets therefor, less all transportation charged which shall first be deducted from such market value or selling price and retained by the lessee, and such royalty shall be due and payable at the same times and in the same manner that the royalty on the iron ore sha' be due and payable, and quarterly reports of the grade and kind, quality and quantity of such ores and minerals shall be made at the same times and in the same manner that the iron ore reports are required to be made hereunder.

The covenants, terms, and conditions of this lease shall run with the land and be in all respects binding and operative upon the heirs, executors, administrators and assigns of the respective parties hereto.

In witness whereof the said parties have hereunto set their hands and seals the day and year first above written.

Signed, sealed, and delivered in presence of—

(Signed) MORTON DENISON HULL. [SEAL.]
(Signed) KATHARINE B. HULL. [SEAL.]
(Signed) JOHN A. VERHOEVEN,
(Signed) RICHARD E. DOOLEY,
As to Morton D. Hull & wife
(Signed) EUDORA HULL GAYLORD. [SEAL.]
(Signed) EDWARD S. GAYLORD. [SEAL.]
(Signed) JOHN A. VERHOEVEN,
(Signed) RICHARD E. DOOLEY,
As to Eudora H. Gaylord & husband.
(Signed) MARIE M. OWSLEY. [SEAL.]
(Signed) FREDERICK D. OWSLEY. [SEAL.]
(Signed) E. E. BOEING,
(Signed) E. W. ORTMANN,
As to Marie M. Owsley & husband.
(Signed) MARSHALL H. ALWORTH. [SEAL.]
(Signed) NELLIE ALWORTH. [SEAL.]
(Signed) J. L. WASHBURN,
(Signed) M. B. HANGEN,
As to Marshall H. Alworth & wife.
(Signed) WILLIAM EDWARD BOEING. [SEAL.]
(Signed) CAROLINE M. BOEING. [SEAL.]
(Signed) J. L. WASHBURN,
(Signed) W. D. BAILEY,
As to William Edward Boeing.
(Signed) W. E. BOEING,
(Signed) E. W. ORTMANN,
As to Caroline M. Boeing.
(Signed) LOUIS W. HILL. [SEAL.]
(Signed) H. H. PARKHOUSE,
(Signed) F. A. PEIL,
As to Louis W. Hill.

135 STATE OF ILLINOIS,
County of Cook, ss:

On this 20th day of October before me, a notary public within and for said county, personally appeared Morton Denison Hull and Katharine B. Hull, his wife, to me well known to be the same persons described in and who executed the foregoing instrument, and they acknowledged that they executed the same as their free act and deed.

[SEAL.] (Signed) JOHN A. VERHOEVEN,
Notary Public, Cook Co., Ill.

STATE OF ILLINOIS,
County of Cook, ss:

On this 20th day of October, 1902, before me, a notary public within and for said county, personally appeared Eudora Hull Gaylord and

Edward L. Gaylord, her husband, to me well known to be the same persons described in and who executed the foregoing instrument, and they acknowledged that they executed the same as their free act and deed.

[SEAL.] (Signed) JOHN A. VERHOEVEN,
Notary Public, Cook Co., Ill.

STATE OF VIRGINIA,
City of Richmond, ss:

On this 15th day of October, 1902, before me, a notary public within and for said county, personally appeared Marie M. Owsley and Frederick D. Owsley, her husband, and Caroline Marie Boeing, unmarried, to me well known to be the same persons described in and who executed the foregoing instrument, and they acknowledged that they executed the same as their free act and deed.

[SEAL.] (Signed) JNO. R. JETER, Jr.,
Notary Public, City of Richmond, Va.

My commission expires Jany. 3r', 1903.

136 STATE OF MINNESOTA.
County of St. Louis, ss:

On this 24th day of October, 1902, before me, a notary public in and for said county, personally appeared Marshall H. Alworth and Nellie Alworth, his wife, to me known to be the same persons described in and who executed the foregoing instrument, and they acknowledged that they executed the same as their free act and deed.

[SEAL.] (Signed) J. L. WASHBURN,
Notary Public, St. Louis Co., Minn.

STATE OF MINNESOTA,
County of St. Louis, ss:

On this 8th day of October, 1902, before me, a notary public within and for said county, personally appeared William Edward Boeing, unmarried, to me well known to be the same person described in and who executed the foregoing instrument, and he acknowledged that he executed the same as his free act and deed.

[SEAL.] (Signed) W. D. BAILEY,
Notary Public, Saint Louis County, Minnesota.

137 STATE of MINNESOTA,
County of Ramsey, ss.

On this 3rd day of November, 1902, before me, a notary public within and for said county, personally appeared Louis W. Hill, to me well known to be the same person described in and who executed the foregoing instrument, and he acknowledged that he executed the same as his free act and deed.

[SEAL] (Signed) C. C. MCELWEE,
Notary Public, Ramsey Co., Minn.

To Norton Denison Hull, Katherine B. Hull, Eudora M. Gaylord, Edward L. Gaylord, Marie M. Owsley, Frederick D. Owsley, Marshall H. Alworth, Nellie Alworth, William Edward Boeing, Caroline Marie Boeing:

Upon the lands situate in St. Louis County, Minnesota, and described as the southwest quarter of the southwest quarter (also known as lot numbered three), of section twenty-two (22), in township fifty-eight (58) north, of range twenty (20) west, which under date of October 1st, 1902, was executed by the fee owners of said lands to Louis W. Hill, and which thereafter, under date of November 10th, 1902, was by said Louis W. Hill and wife assigned to Marcus L. Fay, and by said Fay and wife was, under date of March 24th, A. D. 1903, assigned to the Crescent Mining Company, was by instrument of assignment bearing date June 8th, 1903, duly assigned by the said Crescent Mining Company to Oliver Iron Mining Company, which, by virtue of the several assignments aforesaid, is the present owner of said lease.

Dated Duluth, Minn., September 8th, 1903.

OLIVER IRON MINING COMPANY,
By (Signed) GEO. D. SWIFTS,
Assistant Secretary.

138 *Plaintiff's Exhibit G*

This indenture, made this first day of October, in the year of our Lord, one thousand nine hundred and two, by and between Morton Denison Hull and Katharine B. Hull, his wife, Eudora Hull Gaylord, formerly Eudora M. Hull, and Edward L. Gaylord, her husband, all of Chicago, Illinois; Marie D. Owsley, formerly Marie M. Boeing, and Frederick D. Owsley, her husband, of Greenwood, Albemarle County, Virginia; Marshall H. Alworth and Nellie Alworth, his wife, of Duluth, Minnesota; and William Edward Boeing, unmarried, and Caroline Marie Boeing, unmarried, as parties of the first part, hereinafter designated as the lessors, and William H. Cole, of Duluth, Minnesota, as party of the second part, hereinafter designated as the lessee,

Witnesseth that the lessors, for and in consideration of the sum of one dollar, and other valuable considerations to them in hand paid by the lessee, the receipt whereof is hereby acknowledged, and in further consideration of the covenants, promises, and conditions hereinafter contained, to be kept and performed by the lessee, do hereby let, lease, and demise unto the lessee, his heirs and assigns, for the term of fifty (50) years from and after the first day of October, 1902, the following described lands situated in the county of St. Louis and State of Minnesota, to wit:

The northwest quarter of the southeast quarter and the northeast quarter of the southwest quarter of section six (6) in township fifty-seven (57) north, of range twenty (20) west, subject to the

existing grants of railroad rights of way, as the same appear of record in the office of the register of deeds of said county;

Said lands are hereby leased by the lessors to the lessee for the purpose of exploring for and mining, taking out and removing therefrom the merchantable iron ore (as well as other mineral as hereinafter provided for) which is or may hereafter be found on, in or under said lands, together with the right to construct all buildings and to make all excavations, openings, ditches, drains, railroads, wagon roads, and all other improvements on said lands and premises, which are or which may become necessary or suitable for the mining or removal of the iron ore therefrom and the carrying on of mining operations thereon.

Provided, however, that the lessee, his heirs and assigns,
139 shall have the right at any time, upon thirty days' notice, to terminate this agreement and lease in so far as it requires the lessee to mine ore on said lands, or to pay royalty therefor, or to pay taxes thereon, by giving written notice in manner as hereinafter provided to the lessors or their legal representatives or their assigns, who shall in such case acknowledge in writing the receipt of such notice, and this lease shall terminate thirty days after the giving of such notice, whether so acknowledged or otherwise. All arrearages and sums, including taxes, which may be due and payable under this lease up to the time of its termination, as set forth in such notice, shall be paid within thirty days after such termination, and the lessee, his heirs and assigns, upon such termination, shall immediately execute and record a formal relinquishment of such lease in the office of the register of deeds of the said county of St. Louis. Such notice of termination may be delivered personally to the lessors or their legal representatives or assigns, or it may be given by registered letters mailed from any post office in the United States, postage prepaid, and addressed to the lessors or their legal representatives or assigns, at their last known respective places of residence.

The lessors hereby further agree that the lessee, his heirs and assigns, shall have the right to assign this lease, or contract with others to work any mine or mines which are now or may hereafter be discovered upon said lands, or subcontract or sublet the same, at his or their option, with the same rights and priveleges as are herein granted to the lessee, it being expressly understood, however, that any such assignment shall not operate as a release or discharge of the lessee from the performance of the conditions of this lease, until and unless the lessors shall specifically consent to said assignment in writing.

Specific consent is hereby given to assign this lease to the Buffalo and Susquehanna Iron Company, its successors and assigns, if the lessee herein desires to do so.

The lessee, for himself, his heirs, and assigns, hereby covenants and agrees to and with the lessors, that the lessee will from and after this date, on or before the tenth days of January, April, July,

and October in each calendar year of the term covered by this lease, or during the period of time for which this contract and lease continues in force, pay to the lessors for all iron ore which shall be mined and removed from said lands during the three calendar months next preceding the first day of the month in which payment
140 is to be made as aforesaid, a royalty at and of twenty-five cents per ton for all iron ore so taken out, mined, and carried away from all said lands and premises, each ton in all cases to be reckoned at 2,240 pounds.

The lessee, for himself, his heirs, and assigns, hereby covenants and agreees with the lessors that from and after this date, during each and every calendar year of the period or term of this lease, or until the surrender or assignment of the same in the manner herein provided, the lessee will mine and remove from said lands (which for all and singular the purposes of this lease shall be inseparable and considered as only one tract or parcel) at least one hundred thousand (100,000) gross tons of iron ore annually, or that he will pay to the lessors an advance royalty, which shall be treated and considered as ground rent, of twenty-five cents per gross ton on said minimum quantity each year, the same as if actually mined and removed, it being the express intention hereof that it shall be optional with the lessee either to mine, remove and ship away iron ore from said lands during each calendar year while this lease continues in force, or in lieu thereof to pay the lessors an advance royalty of twenty-five cents per ton on said annual minimum quantity of one hundred thousand tons, the same as if actually mined and removed.

The said obligation of the lessee to pay said advance royalty of twenty-five cents per ton upon one hundred thousand tons annually, or such ground rent of twenty-five thousand dollars, shall continue in force without regard to the quantity or quality of ore existing in the premises, during the full term of this lease or until the same is terminated and surrendered or assigned in the manner herein provided, and, in case of an assignment of this lease in the manner herein provided, the obligation to mine and pay for such annual minimum quantity of ore, as well as all other provisions of this lease, shall rest upon and bind such assignee as fully as the lease is hereby bound.

If ore is not mined and removed from said lands during any calendar year or years while this lease is in force, said advance royalties (to be considered as ground rent as aforesaid) on said annual minimum of one hundred thousand tons, shall be paid quarterly at the times and in the manner as hereinbefore provided for the payment of royalties for ore actually mined and shipped away; and in case mining operations are carried on and the quantity of iron ore mined and shipped away in any quarter of any calendar year is less
141 than 25,000 tons, advance royalty shall be paid in such sums as shall, together with the amount actually paid as royalties, equal sixty-two hundred and fifty dollars ($6,250), and such sums or amounts paid as advance royalties shall be credited in the pay-

ment of the quarterly royalty for any other quarter or quarters of said year when more than 25,000 gross tons are mined and shipped away, such credit to apply only on the excess of the minimum quantity required to be mined and shipped or paid for during such quarter; and in case more than 25,000 gross tons are mined and shipped away in any quarter of any calendar year, upon which royalties shall be paid as hereinbefore provided, the amount of such payment in excess of $6,250.00 shall be likewise credited in the payment of the quarterly minimum royalty for any other quarter or quarters of such year when less than 25,000 tons is mined and shipped away; it being the express intention hereof that the lessee shall not be required in and for any such calendar year to pay a greater aggregate royalty than $25,000, except and unless a greater quantity than 100,000 gross tons is mined and shipped away in such entire year; and that for all advance royalties and ground rent which shall be paid in any such calendar year and for which ore shall not have been mined and shipped away, the lessee shall have the right, without further payment of royalty and free of charge, to mine and ship away ore in the manner as provided in the next succeeding paragraph hereof, that is to say:

If for any year or years of the life of this contract said lessee shall thus pay moneys, either as advance royalties or ground rent, in excess of the royalty on ore actually mined and removed from said lands during such year or years, then such moneys so paid in excess of the royalty on ore actually mined and removed, shall be credited and applied as payments of royalties on ore which may be mined and removed from said lands or any thereof, during any subsequent year or years, in excess of the stipulated minimum quantity of 100,000 tons.

Provided, however, that during the first year of the life of this contract, the foregoing provisions of this contract shall be modified in this, that the minimum annual output required during said first year shall be fifty thousand (50,000) gross tons instead of one hundred thousand gross tons, and the minimum royalty or ground rent required to be paid during said first year shall be twelve thou-
sand five hundred dollars ($12,500) instead of twenty-five
142 thousand dollars, making the minimum quarterly payments
to be made during said first year thirty-one hundred and twenty-five dollars ($3125) instead of sixty-two hundred and fifty dollars.

The lessee, his heirs and assigns, at the time of making each of said payments, shall transmit to the lessors, their successors and assigns, an exact truthful statement of the amount of iron ore removed from said lands for the three calendar months for which payment is to be made. The iron ore so taken out by the lessee, his heirs and assigns, from said lands shall be weighed by the railroad company transporting the same therefrom, which weights shall determine the quantity as between the parties hereto prima facie.

The lessee, his heirs and assigns, shall furnish the lessors monthly statements showing the aforesaid weights; the right is, however, hereby conceded to and reserved by the lessors, by their duly authorized agents, to inspect, view, and test the correctness of the railroad company's weights at any time and in such manner as may seem proper to adopt, it being understood that any errors in these respects when ascertained are to be cognizable and corrected and any such differences shall be settled and paid for at the next regular quarterly payment.

The lessee hereby covenants and agrees to conduct all his mining operations on said lands in a good, workmanlike manner and in accordance with the requirements of good engineering and so as not to do or cause or permit any unnecessary or unusual permanent injury to the same or inconvenience or hindrance in the subsequent operation of the mine or mines thereon.

The lessee shall pay all taxes and assessments, ordinary and extraordinary, general and specific, which may be levied or assessed upon the lands hereby demised and on the iron ore mined thereon, and on all improvements and personal property thereon while this lease is in force, and shall furnish the lessors with duplicate tax receipts showing the payment of any such assessments or taxes; provided, however, the lessee shall have the right to contest in the counts or otherwise, the validity of any such taxes or assessments in case he shall deem the same unjust, unequal or excessive, or to take such other steps or proceedings as he may deem necessary to compel or secure a reduction, re-adjustment or equalization thereof, before he shall be required hereunder to pay and discharge the same or
143 any part thereof, and at the termination of this lease, or in case the same is surrendered in manner hereinbefore provided, the lessee hereby agrees peaceably to surrender possession of said lands to the lessors.

The lessee further hereby covenants and agrees that, while this lease is in force and until it is surrendered or assigned in manner as herein provided, he will protect said lands and premises from all mechanics or labor liens and keep the title to the same free and clear of all clouds or incumbrances arising therefrom in any way on account of his mining operations thereon, or the use and occupation thereof by him, his agents, servants or employees, or his contractors.

The lessors hereby expressly covenant and represent that the said leased lands are now owned in fee by them in the following proportions, to wit:

Morton Denison Hull, an undivided one-sixth interest therein; Eudora Hull Gaylord, an undivided one-sixth interest therein; Marshall H. Alworth, an undivided one-third interest therein; William Edward Boeing and Caroline Marie Boeing, each an undivided one-twelfth thereof; and Marie M. Owsley an undivided one-sixth thereof, and the said lessors above named each for themselves but not for the others hereby covenant to and with the said lessee that

they are well seized in fee of the interests above specified in the lands and premises aforesaid, and have good right to demise and lease the same in manner and form aforesaid, that the same are free from all encumbrances, except such grants of railroad rights of way as appear of record in said county, and the above leased and demised premises in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, the terms and conditions of this lease being duly kept and performed against all persons lawfully claiming or to claim the whole or any part thereof, the said lessors will warrant and defend, except as to the encumbrances of said rights of way above mentioned and except as to taxes subsequent to the taxes of the year 1901, and except as to charges, claims, or incumbrances arising by reason of the acts or neglect of the lessee, his heirs or assigns, subsequent to the execution of this lease.

The several payments required hereunder to be made shall be made at the Corn Exchange National Bank, of Chicago, Illinois, or at any other bank in the city of Chicago, or elsewhere, as the lessors or their legal representatives or assigns may from time to time
144 in writing designate, and the bank or banks so designated shall be considered and treated as the agent or agents of the lessors, respectively, for the purpose of receiving, collecting, and receipting for such payments. The payments provided in this lease to be made by the lessee shall be made in gold coin of the United States of the present standard or its equivalent.

It is mutually understood and agreed that upon the termination of this lease, whether by the acts of the parties or either of them, or by expiration of the terms, the lessee, his heirs or assigns, shall have sixty days in which to remove all engines, tools, machinery, railroad tracks, or structures erected or placed by it or them upon said premises, provided that all taxes, royalties, or other dues have been paid and other conditions performed, but he or they shall not remove or impair any supports placed in the mine or mines nor any timber or frame work necessary to the use and maintenance of shafts or the approaches to the mine or mines, or the tramways within the same, and on failure within the time above specified to so remove such property, all of the same shall belong to and become the property of the lessors or their successors in interest.

The lessors expressly reserve to themselves (and the lessee hereby assents thereto) the right, by their duly authorized agents, to enter into or upon said leased lands, mines, and premises at any time or times, to inspect and survey the same, and to measure the quantity of ore which shall have been mined and removed therefrom, not unnecessarily or unreasonably hindering or interrupting the operations of the lessee.

This lease is upon the express condition that if such royalty or any part thereof, be and remain unpaid ofter the days and times above specified, and if the same remain in default for a period of sixty days, or in case the lessee fails to keep any of the covenants or conditions herein expressed to be kept and performed by him, and

which failure shall continue for sixty days after receiving written notice from the lessors specifying the default, neglect, or failure complained of, then and from thenceforth and in either of these events, but not otherwise, it shall be lawful for the lessors at their option to take possession of said leased lands with or without any previous process whatever, to re-enter and have and possess the same again as fully as if no lease had been given to the lessee, and he and all parties claiming under him shall be wholly excluded therefrom, and the lessors hereby reserve and shall at all times
145 have, possess, and hold a lien upon all ore mined and upon all improvements made upon said lands and premises by the lessee for unpaid balances hereunder.

In case other ores and minerals are discovered and mined on said lands by the lessee, he being hereby expressly granted the right to mine and remove the same, the royalty thereon shall be thirty-three (33) per centum of the market value or selling price of all such ores or minerals at the market or markets therefor, less all transportation charges which shall first be deducted from such market value or selling price and retailed by the lessee, and such royalty shall be due and payable at the same times and in the same manner that the royalty on the iron ore shall be due and payable, and quarterly reports of the quality, grade, kind, and quantity of such ores and minerals shall be made at the same times and in the same manner that the iron ore reports are required to be made hereunder.

The covenants, terms, and conditions of this lease shall run with the land and be in all respects binding and operative upon the parties hereto and their respective heirs, legal representatives, and assigns.

In witness whereof the parties have hereunto set their hands and seals the day and year first above written.

(Signed) MORTON DENISON HULL. [SEAL.]
(Signed) KATHERINE B. HULL. [SEAL.]

Signed, sealed, and delivered in presence of—

(Signed) JOHN A. VERHOEVEN,
(Signed) RICHARD E. DOOLEY,
As to Morton Denison Hull and wife.

(Signed) EUDORA HULL GAYLORD. [SEAL.]
(Signed) EDWARD L. GAYLORD. [SEAL.]
(Signed) JOHN A. VERHOEVEN,
(Signed) RICHARD E. DOOLEY,
As to Eudora H. Gaylord and husband.

(Signed) MARIE M. OWSLEY. [SEAL.]
(Signed) FREDERIC D. OWSLEY. [SEAL.]
(Signed) W. E. BOEING,
(Signed) E. W. ORTMANN,
As to Marie M. Owsley and husband.

146 (Signed) MARSHALL H. ALWORTH. [SEAL.]
(Signed) NELLIE ALWORTH. [SEAL.]
(Signed) W. D. BAILEY,
(Signed) R. P. SHANNON,
As to Marshall H. Alworth and wife.
(Signed) WILLIAM E. BOEING. [SEAL.]
(Signed) F. W. HEIMICK,
(Signed) F. A. SCHULTE,
As to William Edward Boeing.
(Signed) CAROLINE M. BOEING. [SEAL.]
(Signed) W. E. BOEING,
(Signed) E. W. ORTMANN,
As to Caroline Marie Boeing.
(Signed) WILLIAM H. COLE. [SEAL.]
(Signed) R. P. SHANNON,
(Signed) L. I. FELTHAM,
As to William H. Cole.

147 STATE OF ILLINOIS,
County of Cook, ss:

On this 20th day of October, 1902, before me, a notary public within and for said county, personally appeared Morton Denison Hull and Katharine B. Hull, his wife, to me well known to be the same persons described in and who executed the foregoing instrument, and they acknowledged that they executed the same as their free act and deed.

[NOTARIAL SEAL.] (Signed) JOHN A. VERHOEVEN,
Notary Public, Cook County, Illinois.

STATE OF ILLINOIS,
County of Cook, ss:

On this 20th day of October, 1902, before me, a notary public within and for said county, personally appeared Eudora Hull Gaylord and Edward L. Gaylord, her husband, to me well known to be the same persons described in and who executed the foregoing instrument, and they acknowledged that they executed the same as their free act and deed.

[NOTARIAL SEAL.] (Signed) JOHN A. VERHOEVEN,
Notary Public, Cook County, Ill.

STATE OF MINNESOTA,
County of St. Louis, ss:

On this 24th day of October, 1902, before me, a notary public within and for said county, personally appeared Marshall H. Alworth and Nellie Alworth, his wife, to me well known to be the same persons described in and who executed the foregoing instrument, and acknowledged that they executed the same as their free act and deed.

(Signed) W. D. BAILEY,
Notary Public, St. Louis County, Minn.

148 STATE OF MINNESOTA,
County of St. Louis, ss:

On this 6th day of October, 1902, before me, a notary public within and for said county, personally appeared William Edward Boeing, to me well known to be the same person who executed the foregoing instrument, and acknowledged that he executed the same as his free act and deed.

[NOTARIAL SEAL.] (Signed) FRANK W. HEIMICK,
Notary Public, St. Louis Co., Minn.

STATE OF VIRGINIA,
City of Richmond, ss:

On this 15th day of October, 1902, before me, a notary public within and for said county, personally appeared Caroline Marie Boeing, Marie M. Owsley, and Frederick W. Owsley, her husband, to me well known to be the same persons who executed the foregoing instrument, and acknowledged that they executed the same as their free act and deed.

[NOTARIAL SEAL.] (Signed) JNO. R. JETER, Jr.,
Notary Public for the City of Richmond, Va.

My commissions expire January 3rd, 1903.

STATE OF MINNESOTA,
County of St. Louis, ss:

On this 25th day of October, 1902, before me, a notary public within and for said county, personally appeared William N. Cole, to me well known to be the same person described in and who executed the foregoing instrument, and acknowledged that he executed the same as his free act and deed.

[NOTARIAL SEAL.] (Signed) ROBERT P. SHANNON,
Notary Public St. Louis County, Minn.

149 *Plaintiff's Exhibit H*

This indenture, made this sixth day of December, in the year of our Lord one thousand nine hundred and two, by and between Morton Denison Hull and Katharine B. Hull, his wife, Eudora Hull Gaylord, formerly Eudora M. Hull, and Edward L. Gaylord, her husband, all of Chicago, Illinois; Marie M. Owsley, formerly Marie M. Boeing, and Frederick D. Owsley, her husband of Greenwood, Albemarle County, Virginia; Marshall H. Alworth and Nellie Alworth, his wife, of Duluth, Minnesota, William Edward Boeing, unmarried, and Caroline Marie Boeing, unmarried, as parties of the first part, hereinafter designated as the lessors, and Louis W. Hill, of St. Paul, Minnesota, as party of the second part, hereinafter designated as the lessee,

Witnesseth that the lessors, for and in consideration of the sum of one dollar, and other valuable considerations to them in hand paid by the lessee, the receipt whereof is hereby acknowledged, and in further consideration of the covenants, promises and conditions

hereinafter contained, to be kept and performed by the lessee, do hereby let, lease and demise unto the lessee, his heirs and assigns, for the term of fifty (50) years from and after the first day of January, 1903, the following described lands, situated in the county of St. Louis and State of Minnesota, to wit:

The southeast quarter of the northeast quarter of section eleven (11) and the southwest quarter of the northwest quarter of section twelve (12), in township fifty-seven (57) north, of range twenty-one (21) west, subject to the existing grants of railroad rights of way, as the same appear of record in the office of the register of deeds of said county.

Said lands are hereby leased by the lessors to the lessee for the purpose of exploring for and mining, taking out, and removing therefrom the merchantable iron ore (as well as other minerals as hereinafter provided for), which is or may hereafter be found on, in or under said lands, together with the right to construct all buildings and make all excavations, openings, ditches, drains, railroads, wagon roads, and other improvements on said lands and premises, which are or which may become necessary or suitable for the mining or removal of the iron ore therefrom and the carrying on of mining operations thereon.

150 Provided, however, that the lessee, his heirs and assigns, shall have the right at any time, upon thirty days notice, to terminate this agreement and lease, in so far as it requires the lessee to mine ore upon said lands, or to pay royalty therefor, or to pay taxes thereon, by giving written notice in manner as hereinafter provided to the lessors, or their legal representatives or their assigns, who shall in such case acknowledge in writing the receipt of such notice, and this lease shall terminate thirty days after the giving of such notice, whether so acknowledged or otherwise. All arrearages and sums, including taxes, which may be due and payable under this lease up to the time of its termination, as set forth in such notice, shall be paid within thirty days after such termination, and the lessee, his heirs and assigns, upon such termination, shall immediately execute and record a formal relinquishment of such lease in the office of the register of deeds of said St. Louis County. Such notice of termination may be delivered personally to the lessors or their legal representatives or assigns, or it may be given by registered letters mailed from any post office in the United States, postage prepaid, and addressed to the lessors, or their legal representatives or assigns, at their last known respective places of residence.

The lessors hereby further agree that the lessee, his heirs and assigns, shall have the right to assign this lease, or contract with others to work any mine or mines which are now or hereafter may be discovered upon said lands, or subcontract or sublet the same, at his or their option, with the same rights and privileges as are herein granted to the lessee, it being expressly understood, however,

that any such assignment shall not operate as a release or discharge of the lessee from the performance of the conditions of this lease, until and unless the lessors shall specifically consent to said assignment in writing.

The lessee, for himself, his heirs and assigns, hereby covenants and agrees to and with the lessors, that the lessee will, from and after January 1", 1903, on or before the tenth days of January, April, July, and October in each calendar year of the term covered by this lease, or during the period of time for which this contract and lease continues in force, pay to the lessors for all iron ore which shall be mine, and removed from said lands during the three calendar months next preceding the first day of the month in which payment is to be made as aforesaid, a royalty at and of twenty-five
151 cents per ton for all iron ore so taken out, mined, and carried away from all said lands and premises, each ton in all cases to be reckoned at 2,240 pounds.

The lessee, for himself, his heirs and assigns, hereby covenants and agrees with the lessors that from and after January 1", 1903, during each and every calendar year of the period or term of this lease, or until the surrender or assignment of the same in the manner herein provided, the lessee will mine and remove from said lands (which for all and singular the purposes of this lease shall be inseparable and considered as only one tract or parcel) at least one hundred thousand (100,000) gross tons of iron ore annually or that he will pay to the lessors an advance royalty, which shall be treated and considered as ground rent, of twenty-five cents per gross ton on said minimum quantity each year, the same as if actually mined and removed, it being the express intention hereof that it shall be optional with the lessee, either to mine, remove, and ship away iron ore from said lands during each calendar year while this lease continues in force, or, in lieu thereof, to pay the lessors as advance royalty of twenty-five cents per ton on said annual minimum quantity of one hundred thousand tons, the same as if actually mined and removed.

The said obligation of the lessee to pay said advance royalty of twenty-five cents per ton upon one hundred thousand tons annually, or such ground rent of twenty-five thousand dollars, shall continue in force without regard to the quantity or quality of ore existing in the premises during the full term of this lease or until the same is terminated and surrendered, or assigned in the manner hereinbefore provided, and, in case of an assignment of this lease as herein provided, the obligation to mine and pay for such annual minimum quantity of ore, as well as all other provisions of this lease, shall rest upon and bind such assignee as fully as the lessee is hereby bound.

And, in order that the lessors may enjoy the benefit of quarterly payments of royalty, whatever may be the amount of iron ore mined and removed, or whether mining operations be carried on or not, it is agreed that such minimum royalties or ground rent, amounting to

twenty-five thousand dollars, shall be paid in quarter yearly installments of sixty-two hundred and fifty dollars each, at the times hereinbefore specified for the payment of royalties on ore mined and removed; provided, however, that when any such quarterly payment shall become due, if the ore which shall then have been mined and removed during the same year and for which royalty shall
152 have become payable, as hereinbefore provided, shall equal or exceed the aggregate amount of such minimum royalties for the quarters then elapsed, and not theretofore paid, in such case, the royalty paid for such iron ore mined and removed shall satisfy the foregoing obligation for the quarterly payment of such minimum royalty, it being the express intention hereof that the lessee shall not be required in and for any such calendar year to pay a greater aggregate royalty than twenty-five thousand dollars, except and unless a greater quantity than 100,000 gross tons is mined and shipped away in such entire year.

If for any year or years of the life of this contract said lessee shall thus pay monies, either as advance royalties or ground rent, in excess of the royalty on ore actually mined and removed from said lands during such year or years, then such monies so paid in excess of the royalty on ore actually mined and removed, shall be credited and applied as payments of royalties on ore which may be mined and removed from said lands, or any thereof, during any subsequent year or years, in excess of the stipulated minimum quantity of one hundred thousand tons.

Provided, however, that during the first year of the life of this contract, the foregoing provisions of this contract shall be modified in this: That the minimum annual output required during said first year shall be fifty thousand (50,000) gross tons instead of one hundred thousand gross tons, and the minimum royalty or ground rent required to be paid during said first year shall be twelve thousand five hundred dollars ($12,500), instead of twenty-five thousand dollars, making the minimum quarter payments to be made during said first year thirty-one hundred and twenty-five dollars, instead of sixty-two hundred and fifty dollars.

The lessee, his heirs and assigns, at the time of making each of said payments, shall transmit to the lessors, their successors and assigns, an exact truthful statement of the amount of iron ore removed from said lands for the three calendar months for which payment is to be made. The iron ore so taken out by the les'ee, his heirs and assigns, from said lands, shall be weighed by the railroad company transporting the same therefrom, which weights shall determine the quantity as between the parties hereto prima facie.

The lessee, his heirs and assigns, shall furnish the lessors monthly statements showing the aforesaid weights; the right is however hereby conceded to and reserved by the lessors, by their duly
153 authorized agents, to inspect, view, and test the correctness of the railroad company's weights at any time and in such manner as may seem propert to adopt, it being understood that any errors

in these respects, when ascertained, are to be cognizable and corrected and any such differences shall be settled and paid for at the next regular quarterly payment.

The lessee hereby covenants and agrees to conduct all his mining operations on said lands in a good, workmanlike manner and in accordance with the requirements of good engineering and so as not to do or cause or permit any unnecessary or unusual permanent injury to the same or inconvenience or hindrance in the subsequent operation of the mine or mines thereon.

The lessee shall pay all taxes and assessments, ordinary and extraordinary, general and specific, which may be levied or assessed upon the lands hereby demised and on the iron ore mined thereon, and on all improvements and personal property thereon while this lease is in force, and shall furnish the lessors with duplicate tax receipts showing the payment of any such assessments or taxes; provided, however, that the lessee shall have the right to contest, in the courts or otherwise, the validity of any such taxes or assessments, in case he shall deem the same unjust, unequal, or excessive, or to take such other steps or proceedings as he may deem necessary to compel or secure a reduction, readjustment, or equalization thereof, before he shall be required hereunder to pay and discharge the same or any part thereof, and at the termination of this lease, or in case the same is surrendered in manner hereinbefore provided, the lessee hereby agrees peaceably to surrender possession of said lands to the lessors.

The lessee further hereby covenants and agrees that, while this lease is in force and until it is surrendered or assigned in manner as herein provided, he will protect said lands and premises from all mechanics' or labor liens and keep the title to the same free and clear of all clouds or incumbrances arising therefrom in any way on account of his mining operation thereon, or the use and occupation thereof by him, his agents, servants or employees, or his contractors.

The lessors hereby expressly covenant and represent that the said leased lands are now owned in fee by them in the following proportions, to wit:

Morton Denison Hull, and undivided one-sixth interest therein;

Eudora Hull Gaylord, an undivided one-sixth interest therein;

154 Marshall H. Alworth, an undivided one-third interest therein;

William Edward Boeing and Caroline Marie Boeing, each an undivided one-twelfth thereof; and Marie M. Owsley, an undivided one-sixth thereof; and the said lessors above named, each for themselves, but not for the others, hereby covenant to and with the said lessee that they are well seized in fee of the interests above specified in the lands and premises aforesaid, and have good right to demise and lease the same in manner and form aforesaid; that the same are free from all incumbrances, except such grants of railroad rights of way as appear of record in said county, and the above leased and demised premises, in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, the terms and conditions of

this lease being duly kept and performed, against all persons lawfully claiming or to claim the whole or any part thereof, the said lessors will warrant and defend, except as to the incumbrances of said rights of way above mentioned, and except as to taxes subsequent to the taxes of the year 1902, and except as to charges, claims, or incumbrances arising by reason of the acts or neglect of the lessee, his heirs, or assigns, subsequent to the execution of this lease.

The several payments required hereunder to be made shall be made at the Corn Exchange National Bank of Chicago, Illinois, or at such other bank in the city of Chicago, or elsewhere, as the lessors or their legal representatives or assigns may from time to time in writing designate, and the bank or banks so designated shall be considered and treated as the agent or agents of the lessors, respectively, for the purpose of receiving, collecting, and receipting for such payments. The payments provided in this lease to be made by the lessee, shall be made in gold coin of the United States of the present standard, or its equivalent.

It is mutually understood and agreed that upon the termination of this lease, whether by the acts of the parties, or either of them, or by expiration of the term, the lessee, his heirs, or assigns, shall have sixty days in which to remove all engines, tools, machinery, railroad trucks, or structures erected or placed by him or them upon said premises, provided that all taxes, royalties, or other dues have been paid and other conditions performed, but he or they shall not remove or impair any supports placed in the mine or mines, nor any timber or frame work necessary to the use and maintenance of shafts or the approaches to the mine or mines, or the tramways within the same, and on failure within the time above specified to so
155 remove such property, all of the same shall belong to and become the property of the lessors, or their successors in interest.

The lessors expressly reserve to themselves (and the lessee hereby assents thereto) the right by their duly authorized agents to enter into or upon said leased lands, mines, and premises, at any time or times, to inspect and survey the same, and to measure the quantity of ore which shall have been mined and removed therefrom, not unnecessarily or unreasonably hindering or interrupting the operations of the lessee.

This lease is upon the express condition that if such royalty, or any part thereof, be and remain unpaid after the days and time above specified, and if the same remain in default for a period of sixty days, or in case the lessee fails to keep any of the covenants or conditions herein expressed to be kept and performed by him, and which failure shall continue for sixty days after receiving written notice from the lessors specifying the default, neglect, or failure complained of, then and from thenceforth and in either of these events, but not otherwise, it shall be lawful for the lessors at their option to take possession of said leased lands, with or without any previous process whatever, to reenter and have and possess the same again as fully as if no lease

had been given to the lessee and he and all parties claiming under him be wholly excluded therefrom, and the lessors hereby reserve and shall at all times have, possess, and hold a lien upon all ore mined and upon all improvements made upon said lands and premises by the lessee for unpaid balances hereunder.

In case other ores and minerals are discovered and mined on said lands by the lessee (he being expressly hereby granted the right to mine and remove the same) the royalty thereon shall be thirty-three per centum of the market value or selling price of all such ores or minerals at the market or markets therefor, less all transportation charges, which shall first be deducted from such market value or selling price and retained by the lessee, and such royalty shall be due and payable at the same times and in the same manner that the royalty on the iron ore shall be due and payable, and quarterly reports of the quality, grade, kind, and quantity of such ores and minerals shall be made at the same times and in the same manner that the iron ore reports are required to be made hereunder.

The covenants, terms, and conditions of this lease shall run
156 with the land and be in all respects binding and operative upon the parties hereto, their respective heirs, legal representatives, and assigns.

In witness whereof the parties hereto have hereunto set their hands and seals the day and year first above written.

Signed, sealed, and delivered in presence of—

(Signed) MORTON DENISON HULL. [SEAL.]
(Signed) KATHARINE B. HULL. [SEAL.]
(Signed) RICHARD E. DOOLEY,
(Signed) JOHN A. VERHOEVEN,
As to Morton Denison Hull and wife.

(Signed) EUDORA HULL GAYLORD. [SEAL.]
(Signed) EDWARD L. GAYLORD. [SEAL.]
(Signed) RICHARD E. DOOLEY,
(Signed) JOHN A. VERHOEVEN,
As to Eudora Hull Gaylord and husband.

(Signed) MARIE M. OWSLEY. [SEAL.]
(Signed) FREDERICK D. OWSLEY. [SEAL.]
(Signed) MARY S. CHASE,
(Signed) HANNAH NICHOLSON,
As to Marie M. Owsley & husband.

(Signed) MARSHALL H. ALSWORTH. [SEAL.]
(Signed) NELLIE ALWORTH. [SEAL.]
(Signed) F. W. HEIMICK,
(Signed) E. C. SMITH,
As to Marshall H. Alworth and wife.

(Signed) WILLIAM EDWARD BOEING. [SEAL.]
(Signed) MARY S. CHASE,
(Signed) HANNAH NICHOLSON,
As to William Edward Boeing.

(Signed) CAROLINE MARIE BOEING. [SEAL.]
(Signed) MARY S. CHASE,
(Signed) HANNAH NICHOLSON,
As to Caroline Marie Boeing.
(Signed) LOUIS W. HILL. [SEAL.]
(Signed) H. H. PARKHOUSE,
(Signed) F. A. PEIL,
As to Louis W. Hill.

157 STATE OF ILLINOIS,
County of Cook, ss:
On this 13th day of December, 1902, before me, a notary public within and for said county, personally appeared Morton Denison Hull and Katharine B. Hull, his wife, to me well known to be the the same persons described in and who executed the foregoing ment, and they acknowledged that they executed the same as their free act and deed.
[NOTARIAL SEAL.] (Signed) JOHN A. VERHOEVEN,
Notary Public, Cook Co., Ill.

STATE OF ILLINOIS,
County of Cook, ss:
On this 13th day of December, 1902, before me, a notary public within and for said county, personally appeared Marshall H. Alworth lord and Edward L. Gaylord, her husband, to me well known to be the same persons described in and who executed the foregoing instrument, and they acknowledged that they executed the same as their free act and deed.
[NOTARIAL SEAL.] (Signed) JOHN A. VERHOEVEN,
Notary Public, Cook Co., Ill.

STATE OF VIRGINIA,
County of Albemarle, ss:
On this 20th day of December, 1902, before me, a notary public within and for said county, personally appeared Marie M. Owsley and Frederick D. Owsley, her husband, to me well known to be the same persons described in and who executed the foregoing instrument, and they acknowledged that they executed the same as their free act and deed.
[NOTARIAL SEAL.] (Signed) W. L. WALLACE,
Notary Public, Albemarle Co., Va.

158 STATE OF MINNESOTA,
County of St. Louis, ss:
On this 23rd day of December, 1902, before me, a notary public within and for said county, personally appeared Marshall H. Alworth and Nellie Alworth, his wife, to me well known to be the same per-

sons described in and who executed the foregoing instrument, and they acknowledged that they executed the same as their free act and deed.

[NOTARIAL SEAL.] (Signed) FRANK W. HEIMICK,
Notary Public, St. Louis Co., Minn.

STATE OF VIRGINIA,
County of Albemarle, ss:

On this 20th day of December, 1902, before me, a notary public within and for said county, personally appeared William Edward Boeing, unmarried, to me well known to be the same person described in and who executed the foregoing instrument, and he acknowledged that he executed the same as his free act and deed.

[NOTARIAL SEAL.] (Signed) W. L. WALLACE,
Notary Public, of Virginia Co., Albemarle.

STATE OF VIRGINIA,
County of Albemarle, ss:

On this 20th day of December, 1902, before me, a notary public within and for said county, personally appeared Caroline Marie Boeing, unmarried, to me well known to be the same person described in and who executed the foregoing instrument, and she acknowledged that she executed the same as her free act and deed.

[NOTARIAL SEAL.] (Signed) W. L. WALLACE,
Notary Public, of Virginia Co., Albemarle.

159 STATE OF MINNESOTA,
County of Ramsey, ss:

On this 9th day of January, 1903, before me, a notary public within and for said county, personally appeared Louis W. Hill, to me well known to be the same person described in and who executed the foregoing instrument, and he acknowledged that he executed the same as his free act and deed.

[NOTARIAL SEAL.] (Signed) C. C. MCELWEE,
Notary Public, Ramsey Co., Minn.

160 *Plaintiff's Exhibit I*

This indenture, made this first day of October, in the year of our Lord one thousand nine hundred and three (1903), by and between Marshall H. Alworth and Nellie Alworth, his wife, of Duluth, Minnesota; Morton Dension Hull and Katharine S. Hull, his wife, Eudora Hull Gaylord, formerly Eudora M. Hull, and Edward L. Gaylord, her husband, all of Chicago, Illinois; Marie M. Owsley, formerly Marie M. Boeing, and Frederick D. Owsley, her husband, William Edward Boeing, unmarried, and Caroline Marie Boeing, unmarried, all of Albemarle County, Virginia, parties of the first part, hereinafter designated as the lessors, and Russell M. Bennett, of

Minneapolis, and E. J. Longyear, of Hibbing, Minnesota, parties of the second part, hereinafter designated as the lessees,

Witnesseth that the lessors, for and in consideration of the sum of one dollar, and other valuable considerations to them in hand paid by the lessees, the receipt whereof is hereby acknowledged, and in further consideration of the convenants, promises, and conditions hereinafter contained, to be kept and performed by the lessees, do hereby let, lease and demise unto the lessees, their heirs and assigns, for a term of twenty-five (25) years from and after the date of this instrument, the following-described land situated in the county of St. Louis and State of Minnesota, to wit:

The southwest quarter of the southeast quarter and the southeast quarter of the southwest quarter of section six (6) in township fifty-seven (57) north, of range twenty (20) west of the fourth principal meridian.

Said lands are hereby leased by the lessors to the lessees for the purpose of exploring for and mining, taking out, and removing therefrom the merchantable iron ore (as well as other minerals, as hereinafter provided for), which is or which may hereafter be found on, in or under said lands, together with the right to construct all buildings and to make all excavations, openings, ditches, drains, railroads, wagon roads, and all other improvements upon said lands and premises, which are or may become necessary or suitable for the mining or removing of the iron ore therefrom, and the carrying on of mining operations thereon, and together with the right, during the continuance of this lease, to cut and use all of the timber, other
161 than pine timber, which may be found up said lands, free and without charge, so far as may be necessary for fuel and in the construction of buildings required in the operation of any mine or mines upon said lands, and for drains, tramways, supports, or shafts of or within any such mines or mines, or in connecting the same with any line or lines of railroad over or upon which said ore may be transported.

Provided, however, that the lessees, their heirs or assigns, shall have the right at any time upon thirty days' notice to terminate this agreement and lease, in so far as it requires the lessees to mine ore on said lands or to pay royalty therefor, or to pay taxes thereon, by giving written notice in manner as hereinafter provided, to the lessors or their legal representatives or their assigns, who shall, in such case, acknowledge in writing the receipt of such notice, and this lease shall terminate thirty days after the giving of such notice, whether so acknowledged or otherwise. All arrearages and sums, including taxes, which may be due and payable under this lease up to the time of its termination, as set forth in such notice, shall be paid within thirty days after such termination, and the lessees, their heirs and assigns, upon such termination, shall immediately execute and record formal relinquishment of such lease in the office of the register of deeds of the county of St. Louis. Such notice of termination may be delivered personally to the lessors, their legal repre-

sentatives or assigns, or it may be given by registered letters mailed from any postoffice in the United States, postage prepaid, and addressed to the lessors or their legal representatives, or their assigns, at their last known respective places of residence.

The lessors hereby further agree that the lessees, their heirs and assigns, shall have the right to assign this lease, or contract with others to work any mine or mines which are now or may hereafter be discovered upon said lands, or subcontract or sublet the same, at their option, with the same rights and privileges as are hereby granted to the lessees, it being expressly understood, however, that any such assignment shall not operate as a release or discharge of the lessees from the performance of the conditions of this lease, until and unless the lessors shall specifically consent to said assignment in writing.

The lessees, for themselves, their heirs and assigns, hereby covenant and agree to and with the lessors that the lessees will from and after the first day of October, 1903, and on or before the
162 tenth days of January, April, July, and October in each calendar year covered by the terms of this lease, or during the period of time for which this contract and lease continues in force, pay to the lessors for all iron ore which shall be mined and removed from said lands during the three calendar months next preceding the first day of the month in which payment is to be made as aforesaid a royalty at and of twenty-five cents per ton for all iron ore so taken out, mined, and carried away from said lands and premises, each ton in all cases to be reckoned at 2,240 pounds.

The lessees, for themselves, their heirs and assigns, hereby covenant and agree, to and with the lessors, that from and after the date of this lease, during each and every calendar year for the period or term of this lease, or until the surrender or assignment of the same, in the manner herein provided, the lessees will mine and remove from the said lands (which for all and singular the purposes of this lease shall be inseparable and considered as one tract or parcel) at least seventy-five thousand (75,000) gross tons of iron ore annually, or that they will pay to the lessors an advance royalty, which shall be treated and considered as ground rent, of twenty-five cents per gross ton on such minimum quantity each year, the same as if actually mined and removed, except that for the first two years of this lease, the minimum amount agreed to be mined or paid for whether mined or not, shall be fifty thousand (50,000) gross tons annually, it being the express intention hereof that it shall be optional with the lessees either to mine, remove and ship away iron ore from said premises during each calendar year while this lease continues in force, or in lieu thereof, to pay the lessors an advance royalty of twenty-five cents per ton on said annual minimum quantity above specified, the same as if actually mined and removed. The said obligation of the lessees to pay said advance royalties of twenty-five cents (25 cents) per ton upon fifty thousand tons annually for the first two years of this

lease, and upon seventy-five thousand tons annually for the remainder of the period thereof, or such ground rent equivalent to twenty-five cents per ton upon said minimum annual quantities, shall continue in force without regard to the quantity or quality of ore existing in the premises, during the full term of this lease, or until the same is terminated and surrendered or assigned in the manner herein provided, and in case of assignment of this lease in the manner herein provided, the obligation to mine and pay for such minimum
163 annual quantities of ore, as well as all other provisions of this lease, shall rest upon and bind such assignee as fully as the lessees are hereby bound.

The said ground rent or advance royalties herein agreed to be paid shall become due and be paid quarterly, at the times and in the manner as hereinbefore provided for the payment for ore actually mined and shipped away; provided, however, that if in any one or more years, or in any quarter or quarters of any year or years, more ore is thus paid for than is actually mined and removed in such year or years or in any quarter or quarters of such year or years, then and in such case the iron ore so paid for and not removed may be removed in any subsequent year or years, or in any subsequent quarter or quarters of such year or years, during the continuance of this lease, without other payment therefor, but such ore so permitted to be removed in any subsequent quarter or quarters of any such year must be in excess of the aggregate minimum amount agreed herein to be mined and removed or paid for during all of the quarters of such year, which shall have, at the time of such payment, expired, and the ore so permitted to be removed in any subsequent year, in consideration of such pre-payment, must be in excess of the stipulated amount agreed to be mined and removed and paid for, whether mined or not, during such year; it being the intention hereof that the lessee shall not be required to make pre-payment as advance royalties or ground rent, for any greater quantity of iron ore during any year of this lease, than fifty thousand tons annually during the first two years thereof and seventy-five thousand tons annually thereafter, unless a greater quantity than said amount is actually mined and removed from said premises.

The lessees, their heirs and assigns, at the time of making each of said payments, shall transmit to the lessors, their legal representatives or assigns, an exact truthful statement of the amount of iron ore removed from said lands for the three calendar months for which such payment is to be made. The iron ore so taken out by the lessees, their heirs and assigns, from said lands shall be weighed by the railroad company transporting the same therefrom, which weights shall determine the quantity as between the parties hereto prima facie.

The lessees, their heirs and assigns, shall furnish to the lessors, monthly statements showing the aforesaid weights. The right, however, is hereby conceded to and reserved by the lessors, by their duly

authorized agents, to inspect, view, and test the correctness of
164 the railroad company's weights at any time and in such manner as may seem proper to adopt, it being understood that any errors in these respects, when ascertained, are to be cognizable and corrected, and any such differences shall be settled and paid for at the next regular quarterly payment.

The lessees hereby covenant and agree to conduct all their mining operations on said lands in a good, workmanlike manner and in accordance with the requirements of good engineering and so as not to be or cause or permit any unnecessary or unusual permanent injury to the same on inconvenience or hindrance in the subsequent operation of the mine or mines thereon.

The lessees shall pay all taxes and assessments, ordinary and extraordinary, general and specific, which may be levied or assessed upon the lands demised hereby and on the iron ore mined thereon, and on all improvements and personal property thereon, while this lease is in force, and shall furnish the lessors with duplicate tax receipts showing the payment of any such assessments or taxes; provided however, that the lessees shall have the right to contest, in the courts or otherwise, the validity of any such taxes or assessments, in case it shall deem the same unjust, unequal, or excessive, or to take such other steps or proceedings as they may deem necessary to compel or secure a reduction, re-adjustment or equalization thereof, before he shall be required hereunder to pay or discharge the same, or any part thereof, and at the termination of this lease, or in case the same is surrendered in manner as hereinbefore provided, the lessees further hereby agree peaceably to surrender possession of said lands to the lessors.

The lessees further hereby covenant and agree that, while this lease is in force and until it is surrendered and assigned, in manner as herein provided, they will protect said lands and premises from all mechanics' liens or labor liens and keep the title to the same free and clear of all clouds and encumbrances arising therefrom in any way on account of their mining operations thereon, or the use and occupation thereof by them, their agents, servants or employees, or their contractors.

The lessors hereby expressly covenant and represent that the said leased lands are now owned in fee by them in the following proportions, to wit: Marshall H. Alworth, an undivided one-third interest thereof; Morton Denison Hull, an undivided one-sixth thereof;
Eudora Hull Gaylord, an undivided one-sixth thereof; Marie
165 M. Owsley, an undivided one-sixth interest thereof; William Edward Boeing, an undivided one-twelfth interest thereof; and Caroline Marie Boeing, an undivided one-twelfth interest thereof.

The several payments required hereunder to be made shall be made at the Corn Exchange National Bank, of Chicago, Illinois, or at any other bank in the city of Chicago, or elsewhere, as the lessors, or their legal representatives or assigns, may from time to time in

writing designate, and the bank or banks so designated shall be considered and treated as the agent or agents of the lessors, respectively, for the purpose of receiving, collecting, and receipting for such payments. The payments provided in this lease to be made by the lessees shall be made in gold coin of the United States of the present standard or its equivalent.

It is mutually understood and agreed that upon the termination of this lease, whether by the acts of the parties or either of them, or by expiration of the term, the lessees, their heirs and assigns, shall have sixty days in which to remove all engines, tools, machinery, railroad tracks, or structures erected or placed by them upon said premises, provided that all taxes, royalties, or other dues have been paid and other conditions performed, but he or they shall not remove or impair any supports placed in the mine or mines, or any timber or framework necessary to the use or maintenance of the shafts or approaches to the mine or mines or the tramways within the same, and on failure within the time above specified to so remove such property all of the same shall belong to and become the property of the lessors or their successors in interest.

The lessors expressly reserve to themselves (and the lessees hereby assent thereto) the right, by their duly authorized agents, to enter into or upon said leased lands, mines, and premises at any time or times, to inspect or survey the same, and to measure the quantity of ore that shall have been mined or removed therefrom, not unnecessarily or unreasonably hindering or interrupting the operations of the lessees.

This lease is upon the express condition that if such royalty, or any part thereof, be and remain unpaid after the days and times above specified and if the same remain in default for a period of sixty days, or in case the lessees fail to keep any of the covenants or conditions herein expressed to be kept and performed by them, and such failure shall continue for sixty days after receiving written notice from the lessors specifying the default, neglect, or failure com-
166 plained of, then and from thenceforth and in either of those events, but not otherwise, it shall be lawful for the lessors, at their option, to take possession of said leased lands, with or without any previous process whatever, and to re-enter and have and possess the same again as fully as if no lease had been given to the lessees, and they and all parties claiming under them shall be wholly excluded therefrom, and the lessors hereby reserve and shall at all times have, possess, and hold a lien upon all iron ore mined and upon all improvements made upon said lands and premises by the lessees for unpaid balances hereunder.

In case other ores or minerals are discovered or mined said lands by the lessees, they being hereby expressly granted the right to mine and remove the same, the royalty thereon shall be thirty-three per centum of the market value or selling price of all such ores or minerals at the market or markets therefor, less all transportation

charges which shall first be deducted from such market value or selling price and retained by the lessees, and such royalty to be due and payable at the same times and in the same manner that the royalty on the iron ore shall be due and payable, and quarterly reports of the quality, grade, and quantity of such ores and minerals shall be made at the same times and in the same manner that the iron ore reports are required to be made hereunder.

The covenants, terms, and conditions of this lease shall run with the land and be in all respects binding and operative upon the heirs, legal representatives, and assigns of both parties hereto.

In testimony whereof the parties hereto have hereunto set their hands and seals the day and year first above written.

Signed, sealed, and delivered in presence of—

(Signed) MARSHALL H. ALWORTH. [SEAL.]
(Signed) NELLIE ALWORTH. [SEAL.]
(Signed) FRANK W. HEIMICK,
(Signed) JESSIE E. McKAY,
As to Marshall H. Alworth & wife.

167 (Signed) MORTON DENISON HULL. [SEAL.]
(Signed) KATHARINE B. HULL. [SEAL.]
(Signed) EUDORA HULL GAYLORD. [SEAL.]
(Signed) EDWARD L. GAYLORD. [SEAL.]
(Signed) JOHN A. VERHOEVEN,
(Signed) FANNIE H. FOGG,
As to Morton Denison Hull and wife and Eudora H. Gaylord and husband.
(Signed) MARIE M. OWSLEY. [SEAL.]
(Signed) FREDERICK D. OWSLEY. [SEAL.]
(Signed) WILLIAM EDWARD BOEING. [SEAL.]
(Signed) CAROLINE M. BOEING. [SEAL.]
By (Signed) MARIE M. OWSLEY, [SEAL.]
Her Attorney in Fact.
(Signed) HANNAH NICHOLSON,
(Signed) CAROLINE M. MEYER,
As to Marie M. Owsley & husband, William Edward Boeing, and Marie M. Owsley as attorney in fact.
(Signed) RUSSELL M. BENNETT. [SEAL.]
(Signed) E. J. LONGYEAR. [SEAL.]

(Signed) FRANK W. HEIMICK.
(Signed) JESSIE M. McKAY.

168 STATE OF MINNESOTA,
County of St. Louis, ss:

On this 3rd day of November, 1903, before me, a notary public within and for said county, personally appeared Marshall H. Al-

worth and Nellie Alworth, his wife, to me well known to be the same persons described in and who executed the same as their free act and deed.

(Signed) FRANK W. HEIMICK,
Notary Public, St. Louis Co., Minn.

STATE OF ILLINOIS,
County of Cook, ss:

On this 29th day of October, 1903, before me, a notary public within and for said county, personally appeared Morton Denison Hull and Katharine B. Hull, his wife, and Eudora Gaylord and Edward L. Gaylord, her husband, to me well known to be the same persons described in and who executed the foregoing instrument, and they acknowledged that they executed the same as their free act and deed.

[NOTARIAL SEAL.] (Signed) JOHN A. VERHOEVEN,
Notary Public, Cook Co., Ill.

STATE OF VIRGINIA,
County of Albermarle, ss:

On this 23rd day of October, 1903, before me, a notary public within and for said county, personally appeared Marie M. Owsley and Frederick D. Owsley, her husband, and William Edward Boeing, unmarried, to me well known to be the same persons described in and who executed the foregoing instrument, and they acknowledged that they executed the same as their free act and deed; also at the same time and place before me personally appeared Marie M. Owsley as attorney in fact for Caroline Marie Boeing (unmarried), to me known to be the same person described in and who executed the foregoing instrument, and she acknowledged that she executed the same as her own free act and deed as such attorney in fact.

[NOTARIAL SEAL.] (Signed) WM. S. RODES,
Notary Public, Albermarle Co., Va.

My term expires 22nd day Apl., 1907.

169 STATE of MINNESOTA,
County of St. Louis, ss:

On this 3rd day of November, 1903, before me, a notary public within and for said county, personally appeared Russell M. Bennett, to me personally known to be the same person described in and who executed the foregoing instrument, and he acknowledged that he executed the same as his free act and deed.
and who executed the foregoing instrument, and he acknowledged that he executed the same as his free act and deed.

[NOTARIAL SEAL.] (Signed) FRANK W. HEIMICK,
Notary Public, St. Louis County, Minn.

STATE of MINNESOTA,
County of St. Louis, ss:

On this 3rd day of November, 1903, before me, a notary public within and for said county, personally appeared E. J. Longyear, to

me well known to be the same person described in and who executed the foregoing instrument, and he acknowledged that he executed the same as his free act and deed.

[NOTARIAL SEAL.] (Signed) FRANK W. HEIMICK,
Notary Public, St. Louis Co., Minn.

170 MINNEAPOLIS, MINN., *July, 24th, 1905.*

#8

To MARSHALL H. ALWORTH,
MARTIN DENNISON HULL,
EUDORA HULL GAYLORD,
MARIE M. OWSLEY,
WILLIAM EDWARD BOEING, AND
CAROLINE MARIE BOEING:

The undersigned beg to advise you that they have this day assigned to Louis W. Hill, of St. Paul, Minn., the mining lease dated October 1st, 1905, covering the southwest quarter (S. W. ¼) of the southeast quarter (S. E. ¼) and the southeast quarter (S. E. ¼) of the southwest quarter (S. W. ¼) of section six (6) in township fifty-seven (57) north of range twenty (20) west, in St. Louis County, Minnesota. Mr. Hill has accepted said assignment and assumed and agreed to observe and perform all of the obligations of said lease binding upon the undersigned. The assignment also contains the following provisions:

"The second party further covenants and agrees to and with the first parties that he will not surrender said lease, or any right thereunder, or suffer the same to become impaired or forfeited, without first tendering an assignment of said lease to the first parties; and if at any time the second party desires to cease operations under said lease, or to be relieved of the obligations thereof, he will notify said first parties in writing, and upon their written request therefor within thirty (30) days after such notice, will re-assign said lease to them instead of surrendering the same to the lessors, as therein permitted; provided, said first parties shall in said assignment contract agree to save the second party harmless from any future liability under said lease. In case the second party shall assign said lease he shall make such assignment expressly subject to the conditions in this paragraph set forth, and shall embody in said assignment a stipulation requiring the assignee thereafter to do and perform to and for the first parties hereto the acts in this paragraph stipulated to be done and performed by the second parties hereto."

Yours truly,

(Signed) R. M. BENNETT.
(Signed) E. J. LONGYEAR.
Per B.

171 *Plaintiff's Exhibit J*

[Cut.] Treasury Department, Internal Revenue Service

CHICAGO, ILL., *July 13, 1922.*

Office of internal revenue agent Chicago division. Field order No. 31

In re: Eudora Hull Spalding, 2626 Prairie Avenue, Chicago, Ill.

Date of report, July 13, 1922. Years examined, 1917

MADAM: Attached please find copy of report on examination recently made of your income-tax returns by an officer from this office.

Kindly acknowledge receipt of same by signing in the space provided below, and immediately return this entire sheet to the undersigned.

Please retain the carbon copy of report for your files.

Do not mail check until you receive bill from the collector of internal revenue.

Respectfully,

E. E. ALDEN,
Internal Revenue Agent in Charge,
Room 559 Federal Building, Chicago, Illinois.

Receipt is hereby acknowledged of revenue agent's report covering income-tax examination, as above

_____
(Signature)

_____
(Date)

172 JULY 13, 1922.

I. T.
EUDORA HULL SPALDING,
2626 Prairie Avenue, Chicago, Illinois.
Exam. Off., W. W. Elston.

Amended report as to year 1917

	Addl. tax
1917	$35,693.08
1918	77,098.56
1919	20,225.49
Total addl. tax	133,017.13

COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C.

Attention head, field audit division

Enclosed herewith is an amended report of Internal Revenue Agent William W. Elston, dated July 10, 1922, covering his re-examination of the records of the above-named individual for the

year 1917, indicating a corrected net additional tax due in the sum of $133,017.13, which I recommend be assessed.

This examination made under authority of internal revenue agent in charge. Please amend our report of June 20, 1922, accordingly.

In accordance with field order No. 25, the taxpayer will be furnished with a copy of this report.

Enclosures: Duplicate of letter to taxpayer requesting acknowledgment of receipt of copy of report.

E. E. ALDEN,
Internal Revenue Agent in Charge.

SA

173 Eudora Hull Spalding

Schedule 1—Block adjustments, 1917

Block	Return	Additions	Corrected
M	$30,158.75		$194,291.04
N	4,523.81	$24,619.85	29,143.66
Total			165,147.38

Schedule 1 A.—Explanation of items

N. $4,523.81 incorrect; should be $29,143.66. Represents contributions to the amount of 15% of net income of $194,291.04 before deducting same.

In original report submitted, through an error in copying, this amount was made to read $19,143.66 instead of $29,143.66 and "tax due" was computed accordingly.

Total amount of contributions by taxpayer for 1917, as detailed in original report was $35,667.20; hence the full allowance of 15%.

Schedule 2.—Computation of tax

Total net income		$165,147.38
Less: Exemption	$2,000.00	
Dividends	16,666.39	
Dividends	16,666.39	
		18,566.39
Income subject to normal tax		146,580.99
Tax 2% on $146,580.99	2,931.62	
Tax 2% on $144,580.99	2,891.62	
		5,823.24
Surtax wife's income	30,495.69	
		30,495.69
Total tax		36,318.93
Less tax withheld at source	27.00	27.00
Total tax assessable		36,291.93
Tax previously assessed		598.85
Additional tax to be assessed		35,693.08

174 *Plaintiff's Exhibit K*

TREASURY DEPARTMENT,
WASHINGTON, *March 11th, 1920.*

IR:T:NR
JBL:26403243
Mrs. EUDORA HULL SPALDING,
2626 Prairie Avenue, Chicago, Illinois.

Madam: An examination of the information submitted in connection with your income tax returns for the years 1916 and 1917 has resulted in certain changes.

Your corrected net income for the year 1916 is $205,505.28 and is subject to tax as follows:

Total net income		$205,505.28
Less: Dividends	$15,976.11	
Personal exemption	4,000.00	
Amount subject to normal tax at 2%		185,529.17
Income tax on $185,529.11 at 2%		3,710.58
Less: amount paid at source		128.30
Balance of normal tax		3,582.28
Surtax		9,285.37
Total		12,867.65
Tax previously assessed		131.23
Additional tax due for 1916		12,736.42

175 Your corrected net income for the year 1917 is $193,512.31 and is subject to tax as follows:

Total net income		$193,512.31
Less: Dividends	$15,572.64	
Personal exemption	2,000.00	17,572.64
Amount subject to 2% normal tax		175,939.67
Less: Additional exemption		2,000.00
Amount subject to additional normal tax		173,939.67
Normal tax (act of 1917) $175,939.67 at 2%		3,518.79
Normal tax (act of 1916) $173,939.67 at 2%		3,478.79
Surtax		39,288.82
Excess profits tax at 8%		None.
Total		46,286.40
Tax previously assessed		598.85
Additional tax due for 1917		45,687.55
Additional tax due for 1916 (above)		12,736.42
Total additional tax due		$58,423.97

The following are the charges which have been made in your returns:

1916

Deduction taken on return on account of depletion	$274,003.85
Deduction allowed	97,133.60
Amount disallowed and added to net income	176,870.25
Net income as shown on return	28,635.03
Corrected net income	$205,505.28

1917

Deduction taken on return on account of depletion	$260,072.30
Deduction allowed	92,194.92
Amount disallowed and added to net income	167,877.38
Net income as shown on return	25,634.93
Corrected net income	193,512.31

176 Your method of deducting from gross income the entire amount received as royalty from iron mines as depletion is not aproved by this office. The correct amount to be deducted for depletion, based upon the unit cost per ton of mineral reserves, as of March 1, 1913, as determined by the Valuation Engineers of this Department is shown as follows:

Ore reserve, March 1, 1913, according to the Minnesota Tax Commission, as shown on questionnaire of the Royal Mineral Association—tons	191,417,150
Less: Advance royalty payment by lessees, prior to March 1, 1913, on—tons	3,034,258
Net tonnage as of March 1, 1913	188,382,892
Your interest, one-sixth, March 1, 1913—tons	31,397,148.7
Total average extraction, 1913 to 1918, inclusive—tons	4,770,000
Maximum like of mine allowed—years	40
Interest rate allowed	6%
Royalty rate per ton	$0.25
Your capital sum returnable in 40 years	$7,849,287.18
Present worth of your interest, March 1, 1913	2,782,551.64
Unit cost per ton, March 1, 1913, basis for depletion	$0.0886243
Depletion in 1916, 1,096,015.4 tons at $0.0886243	$97,133.60
Depletion in 1917, 1,040,289.4 tons at $0.0886243	92,194.92

The additional taxes in the amount as noted above will be assessed at an early date and notice as to place and time of payment will be sent you by the collector of internal revenue for your district.

Respectfully,

(Signed) G. V. NEWTON,
Acting Assistant to the Commissioner.

177 *Plaintiff's Exhibit L*

JUNE 20, 1922.

I.T.—EUDORA HULL SPALDING,
2626 Prairie Avenue,
Chicago, Illinois.

Exam. officer, W. W. Elston

	Additional tax due
1917	$ 40,892.97
1918	77,098.56
1919	20,225.49
Total addl. tax due	$138,217.02

Protested by taxpayer.

COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C.

Attention head, field audit division

Enclosed herewith is a report of Revenue Agent William W. Elston, dated May 26, 1922, covering his investigation of the above individual for the years 1917 to 1919, inclusive, indicating a total additional tax due in the sum of $138,217.02, which I recommend be assessed.

In accordance with field order #25, the taxpayer will be furnished with a copy of this report.

Enclosure: Duplicate of letter to taxpayer requesting acknowledgment of receipt of copy of report.

One (1) transcript returned herewith, viz: 1916.

E. E. ALDEN,
Internal Revenue Agent in Charge.

M C G.

178 Eudora Hull Spalding, 1917

Schedule 1.—Block adjustments

Block	Return	Additions	Reductions	Corrected
D-3	260,072.30		96,870.74	163,201.56
F	15,572.64	993.75		16,566.39
G	6,721.34		5,371.34	1,350.00
H	14,299.35	5,398.34		19,697.69
I	296,665.63			200,315.64
J	286,806.88		304,839.10	1,967.78
K	30,158.75			199,147.86
M	30,158.75			199,147.86
N	4,833.81	14,619.85		19,143.66
Total	25,634.94			180,004.20

Schedule 1-A—Explanation of items

Block D—$260,072.30 incorrect. Should be $163,201.56. Represents net income received from royalties on iron ore mined in St. Louis County, Minnesota, as follows:

Total tons mined of which taxpayer owned 1/6	ton	6,241,735
1/6 of 6,241,735 tons	ton	1,040,289.2
Less—1,040,289.2 tons at 25c per ton		$260,072.30
Unit cost per ton as of March 1, 1913	$0.0886243	
1040289.2 tons at 0.0886243	$92,194.90	
Guards & checkers at mine	4675.84	
		96,870.74
Net income from mine		163,201.56

Authority for "unit cost per ton as of March 1, 1913" for depletion purposes is contained in Department Letter IR:T:NR:JBL: 26403243 to taxpayer under date of March 11, 1920.

Block F—$15,572.64, incorrect. Should be $16,566.39. Represents income received as dividends on stock of following domestic corporations:

Montgomery Ward & Co		1,260.00
California Petroleum		800.00
Cont'l & Com'l Nat'l Bk		288.00
Wilson & Co		525.00
179 American Radiator		228.00
Corn Exchange Nat'l Bk		600.00
Chicago Title & Trust		1,800.00
Butler Bros		157.50
American Telephone		1,344.00
Deere & Co		3,062.50
International Nat'l Harvester		1,400.00
National Biscuit		2,450.00
Spalding & Co		2,500.00
Lyons & Co		151.39
Total dividends		$16,566.39

Block G—$6,721.34 incorrect. Should be $1,350.00. Represents interest received on tax-free bonds as follows:

Illinois Central R. R	$1,350.00

Block H—$14,299.35 incorrect. Should be $19,697.69. Represents other income as follows:

Interest, bank deposits, mtgs. etc		9,007.98
Interest on bonds of domestic corporations		5,408.63
Interest foreign bonds:		
City of Calgary	980.00	
Bell Tel. of Canada	1,250.00	
Providence of Manitoba	1,225.00	
Great B. & Ireland	1,100.00	
French Republic	704.08	
		5,259.08
2% of block G		27.00
		19,697.69

Block J—$266,506.88 incorrect. Should be $1,667.78. Represents deductions as follows:

Taxes, R. E. Pasadena, Cal., vacant		597.08
Taxes, 2626 Prairie Ave., Chicago (no loc. impr.)		570.90
Taxes, Mid. Country Club dues		100.00
Taxes, Cook Co. R. E., vacant		149.80
Atty. fees for year 1917		1,417.78
		250.00
Total deductions		1,667.78

180 Item $4,765.84—Expenses for guard and checkers at mines deducted and reported under block D.

Item $260,072.30—Depletion—Disallowed.

Block N—$4,523.81 incorrect. Should be $19,143.66. Represents following contributions, of which above amount reported was supposed to be 15% of net income, but corrected return shows sufficient net income to allow contributions as follows:

Net income before deducting contributions	$194,291.04
15% of $194,291.04=$19,143.66.	
$19,143.66—Deductible contributions:	
Contributions—	
Chicago Institute of Tuberculosis	6,000.00
Am. Fund for French Wounded	18,438.08
Am. Hospital, Florence	170.00
Am. Field Service Ambulance	8,200.00
French Facial Surgery Charty	610.00
Visiting Nurse L, Chicago	1,200.00
J. League	75.00
Am. Rights League	50.00
Need Dept. U. S. N. R. F	85.00
Roe Hampton Hospital, Eng. Chantg	119.12
B. F. D. Blink Fund	25.00
Eli Bates House	50.00
Women's War Relief State	75.00
Belgian Relief Fund	550.00
Christmas Ine. Fund A. S	10.00
Civic Music Assn. festival	5.00
Red Cross seals	5.00
Total contributions	$35,667.20

181 Eudora Hull Spalding—1917

Schedule 2.—Computation of tax

Total net income, Schedule 1		$180,004.20
Less: Exemption	$2,000.00	
Dividends	16,566.39	
		18,566.39
Income subject to normal tax		161,437.81
Tax 2% on $161,437.81	3,228.76	
Tax 2% on $159,580.99	3,188.76	
		6,417.52
Surtax on income (wife)	35,101.30	35,101.30
Total tax		41,518.82

Less tax withheld at source (for 1917 not to exceed normal tax)	$27.00	
		$27.00
Total tax assessable		41,491.82
Tax previously assessed		598.85
Additional tax to be assessed		$40,892.97

Schedule 3—1918—Block adjustments

Block	Return	Additions	Reductions	Corrected
A	17,475.72			17,475.72
D	None.	Cr. 4,400.99		Cr. 4,400.99
E	None.	138,287.12		138,287.12
F	1,350.00			1,350.00
G	30,119.50		2,216.25	32,335.84
H	48,945.31			185,047.69
I	18,163.09	2,444.73		21,348.51
J	30,782.22			163,699.13
K-a	14,846.50	437.50		15,284.00
K-b	None.			None.
L	45,628.72			178,983.13
Total	45,628.72			178,983.13

Schedule 3-A—Explanation of items

Block A—$17,475.72 correct. Represents net profits from *p*itrous fruit.

182 **Represents net profits from citrus fruit farm located in Ventura County, California, as follows:**

Gross receipts and sales		167,916.58
Less:		
Hired help	84,078.01	
Seeds & plants	5,346.90	
Fertilizer & 'prays	2,009.85	
Blacksmithing	2,369.82	
Fuel & oil	2,279.94	
Taxes	6,085.75	
Ins	30.00	
Interest farm notes	1,071.49	
R. R. right-of-way		
Cultivation lease	250.00	
Sup. for barns	5,432.80	
" " bldg. hse	6,301.84	
" " packg. hse	5,516.71	
" " pump. plant	4,529.35	
" " misc. & repairs	10,694.63	
Sell'g expense	2,472.34	
Depreciation	11,971.43	
	163,521.76	
		150,440.86
Net profits		17,475.72

Depreciation schedule

Kind	Value	Life	Rate	Amount
Farm bldgs	$46,500.00	20 yrs	5%	$2,325.00
Machinery & tools	65,000.00	10 "	10%	6,500.00
Irrigation system	31,464.30	10 "	10%	3,146.43
Total depreciation				11,971.43

Block D—None reported. Should be $4,400.99 cr. Represents loss on sale of bonds as follows:

Kind	Year bought	Cost	Yr. Sold	Selling price
French Gov't	1916	$49,830.00	Nov., 1918	$46,685.00
U. S. Gov't 3rd Lib.	1918	35,000.00	" 1918	33,946.01
U. S. 4th Liberty	1918	10,000.00	" 1918	9,798.00
Total cost		94,830.00	Total sell. price	90,429.01
		90,429.01		
		4,400.99		

183 Block E—None reported. Should be $138,287.12. Represents net income received from iron ore mined and sold in St. Louis County, Minnesota, as follows:

Total tons mined	5,278,570.32	
5,278,570.32 tons, at 25c. per ton	$1,319,642.58	
1/6 of $1,319,642.58—Taxpayer's share	219,940.43	
Less:		
Expense of watchman & checker at mine	3,685.11	
Depletion—$879,761.72 tons, at 0.0886243	77,968.20	
		81,653.31
		138,287.12

For explanation of depletion, see Block D, Schedule 1-A—Block D.—Year 1917.

Block F—$1,350.00 correct. Represents interest received on tax-free bonds as follows:

Illinois Steel Co	1,350.00

Block E—$30,119.59 incorrect. Should be $32,335.84. Represents other income as follows:

Int. received on mtgs. bank deposits and miscel. notes		23,125.95
Foreign bonds:		
Providence of Manitoba	2,500.00	
City of Calgary	1,000.00	
Great Britain & Ireland	2,200.00	
French Republic	33.64	
Bell Tel. of Canada	1,250.00	
Russian bonds	1,944.25	
Ill. Steel Co	255.00	
		9,182.89
2% on Block F		27.00
		32,335.84

184 Block I—$18,163.09 incorrect. Should be $21,348.51. Represents following deductions:

Taxes:		
2626 Prairie Avenue	$640.00	
Cook Co. R. E. (Mid. C. C. house)	825.57	
Pasadena (vacant)	1,566.65	
Luxury auto. R. R. & excise	638.58	
		$3,670.80

Contributions:		
Chicago Institute, tuberculosis	$7,000.00	
Am. Fund French Wounded	7,319.62	
Fatherless Children, Franc'	2.00	
Visiting Nurse League	1,200.00	
Campbell Memorial	100.00	
Canteen chairs	50.00	
Ravinia Soldiers and Sailors mem	15.00	
Ill. Training School, women	50.00	
Flag for canteen	100.00	
Chicago military band	150.00	
Art Institute, Chicago	1,000.00	
Civic Music Assn	6.00	
Crippled Children's Relief (home)	500.00	
French Children's Relief	50.00	
Stage Women's War Relief	25.00	
Allied Relief Com	5.00	
R. W. & B. Club	55.00	
Italian Relief Assn	50.00	
		$17,677.62
Total deductions		21,348.51

Block K-a—$14,846.50 incorrect. Should be $15,284.00. Represents income received as dividends on stock of following domestic corporations:

Chicago Title & Trust Co	1,800.00
Corn Exchange Nat'l Bk	600.00
Continental & Com. Nat'l Bk	372.00
Montgomery Ward	1,767.50
American Radiator	216.00
A. G. Spalding & Bros	2,765.00
Amer. Tel. & Tel	1,480.00
Deere & Co	2,187.50
Butler Bros	174.00
Int. Nat'l Harvester	1,400.00
Nat'l Biscuit	2,450.00
Santa Paolo Nat'l Bk	72.00
Total dividends	15,284.00

185 Schedule 4—Computation of tax

Total net income, schedule 3		178,983.18
Less: Exemption	2,000.00	
Dividends	15,284.00	
		17,284.00
Income subject to normal tax		161,699.18
Tax 6% on $4,000.00	240.00	
Tax 12% on 157,699.18	18,923.90	
		19,163.90
Surtax on wife's income		65,740.58
Total tax		84,904.48
Less tax withheld at source (for 1917 not to exceed normal tax)	27.00	27.00
Total tax assessable		84,877.48
Tax previously assessed		7,778.92
Additional tax to be assessed		77,098.56

Schedule 5—Block adjustments

A	4,712.17			4,712.17
D	Cr. 48,604.36		442.56	Cr. 48,161.80
E	None.	97,396.05		97,396.05
F	1,350.00	255.00		1,605.00
G	20,176.29		222.90	19,953.39
H	CR. 2,218.04			75,504.81
I	9,139.61	2,717.88		11,857.49
J	Cr. 11,357.65			63,647.32
K-a	18,151.95			18,151.95
L	6,794.30			81,799.27
Total	6,794.30			81,799.27

186 Schedule 5-A

Block A—$4,712.17 correct. Represents net income derived from ranch located in Ventura Co., California, as follows:

Gross income		243,098.03
Less—		
Hired help	119,088.70	
Feed, hay, etc	8,880.92	
Seeds & plants	6,703.95	
Fertilizer & spray	16,924.36	
Blacksmithing	2,480.13	
Fuel oil for tractors	11,785.67	
Taxes, R. E. & personal	7,209.41	
Insurance	2,775.96	
Interest paid	996.52	
R. R. right of way, lease	600.00	
Supplies for barn	1,457.18	
" pck. hse	15,048.48	
" bdg. hse	8,934.68	
" pumping plant	926.05	
" tractors	1,656.76	
Miscel. materials & reprs	8,813.03	
Selling expense	4,385.61	
Depreciation	19,718.45	
		238,385.86
Net profits		4,712.17

187 *From depletion schedule*

Kind	Value	Life	Rate	Amount
Farm bldgs	$80,000.00	20 yrs	5%	$4,000.00
" mchy. & tools	82,184.50	10 "	10%	8,218.45
" irrigation system	65,000.00	16 2/3 yrs	6%	3,900.00
" pumping plant	60,000.00	16 2/3 "	6%	3,600.00
Total depreciation				19,718.45

Block D—$48,604.36 loss. Incorrect. Should be $48,161.80 loss. Represents net loss on sale of stocks as follows:

Kind	Value 3/1/13	Date sold	Selling price
300 Nat'l Biscuit	$42,150.00	Sept. 1919	$39,871.00
80 Deere & Co.	24,500.00	" "	24,953.80
18 Amer. Rad. Company	4,788.00	Oct. "	5,930.14
30 Ill. Steel	26,325.00	" "	25,417.50
296 Mantg. Wood	31,265.00	" "	33,101.60
20 Inter. Harvester	22,600.00	" "	22,762.00
5½% Russian bonds, 1/29/17	61,318.00	Dec. "	7,761.86
12 Butler Bros.	2,574.00	" "	3,290.76
Total cost	215,520.00	Total sales	163,097.14

	Cost price		Selling price
Total cost brot. forward	$215,520.00		$163,097.14
70 Com. Exc. Bank	15,600.00	Dec. 1919	19,951.04
24 Cont. & Com. Bk.	7,512.00	" "	7,463.32
4th Lib. loan bonds	650.00		608.50
Total cost	239,282.00	Total sales	191,120.20

$239,282.00—$191,120.20—$48,161.80 net loss.

Block E—None reported—Should be $97,396.05. Represents net income from iron mines in Minnesota as follows:

Total tons ore mined, $3,717,160.56.
$3,717,160.56 at 25c. per ton $929,290.14
⅙ of $929,290.14—$154,881.69—taxpayer's share.
Less depletion, $54,905.13.
Watchers and checkers $2,580.51 $57,485.64

Net profits 97,396.05

188 Depletion schedule

Unit value per ton of ore as of 3-1-1913—$0.0886243.
⅙ of 3,717,160.56 tons—619,526.76—taxpayer's tonnage.
619,526.76×0.0886243—$54,905.13—depletion.

Block F—$1,350.99 incorrect. Should be $1,605.00. Represents income received as interest on following tax-free bonds.

Illinois Steel Co. $1,605.00

Block G—$20,176.29 incorrect. Should be $19,953.39. Represents other income as follows:

Interest from banks			$1,396.90
" " mtgs			3,220.14
" " A. G. Spalding			1,410.00
" " Pearson Taft & Co			5,000.00
Foreign bonds:			
Russian bonds	$1,944.25		
City of Calgary	1,000.00		
Province Manitoba	2,500.00		
Great Britain & Ireland	2,200.00		
Bell Tel. of Canada	1,250.00		
		8,894.25	
2% of block F		32.10	
			19,953.39

Block I—$9,139.61 incorrect. Should be $11,857.49. Represents deductions as follows:

Taxes—			
R. E. Pasadena, Cal. (vacant)			1,308.32
2626 Prairie Ave., residence			640.09
Auto, R. R., theater, and luxury taxes			638.58
Contributions:			
LaVina T. B. Hospital		110.50	
Boys & Girls Aid Society		10.00	
Amer. French Wounded		3,380.00	
Visiting Nurse's Assn		1,200.00	
Chicago T. B. Institute		4,500.00	
Bohemian Relief		25.00	
Needworth Guid Char		10.00	
Childrens Fund, France		5.00	
Childrens Home, Chicago		10.00	
Art Institute		10.00	
Chicago Lying-in Hospital		10.00	
			9,270.50
Total deductions			11,857.49

189 Block K-a—$18,151.95 correct. Represents income from dividends on stock of following domestic corporations.

A. G. Spalding & Bros	3,792.00
Nat'l Biscuit Co	2,450.00
Montgomery Ward	2,295.20
Deere & Co	1,750.00
Inter Nat'l Harvester Co	1,400.00
Amer. Tel. & Tel	1,480.00
Chicago Title & Trust	1,800.00
Corn Exc. Nat'l Bank	570.00
Cont. & Com. Nat'l Bank	336.00
American Radiator	216.00
Butler Bros	174.00
Santa Paula Bk	143.82
Gulf Land & Impt. Co	100.93
Misel. unknown stock	1,644.00
	18,151.95

Schedule 6—Computation of tax

Total net income, schedule 5		81,799.27
Less: Exemption	2,000.00	
Dividends	18,151.95	20,151.95
Income subject to normal tax		61,647.32
Tax, 4% on $4,000.00	160.00	
Tax, 8% on 57,647.00	4,611.76	4,771.76
Surtax—income	15,511.72	15,511.72
Total tax		20,283.48
Less tax withheld at source (for 1917 not to exceed normal tax)	32.10	32.10
Total tax assessable		20,251.38
Tax previously assessed		25.89
Additional tax to be assessed		20,225.49

190 *Plaintiff's Exhibit M*

(Cut)

Treasury Department, Washington

Office of Commissioner of Internal Revenue

Income Tax Unit.
IT:NR:F-5.
CWA-4233.

Certificate of overassessment.
Number: 118727.
Allowed: $12,878.41.
Rejected: $———.

MRS. EUDORA HULL SPALDING,
2026 Prairie Ave., Chicago, Ill.

MADAM: An audit of your income tax return for 1917, Form 1040, and examination of related claim (if any), indicates that the amount of tax assessed to you for this year was in excess of the amount due:

Tax previously assessed:		
Original assessment	$598.85	
Additional assessment, September, 1920, page 49, line 7	45,687.55	
		$46,286.40
Total tax liability		33,407.99
Overassessment		$12,878.41

For details see the attached statement.

The amount of the overassessment will be applied as follows:

1. If the tax has not been paid, the amount will be abated by the collector of internal revenue for your district.

2. If the tax has been paid, the amount of the overpayment will either be credited against the tax due (if any) on income returns of years other than that on which the overpayment was made; or

3. The balance (if any) of the overpayment is refunded to you by check of the Treasury Department, forwarded herewith.

Included in the accompanying check is interest in the
191 Amount stated below, allowed on the refund or credit, from the date.

Respectfully,

J. G. BRIGHT,
Deputy Commissioner.
By S. ALEXANDER,
Head of Division.

Schedule Number: 9717.
District: 1st Ill.
Item-71-Sheet-3.
Amount abated: $12,878.41.
Amount credited: $———.
Year: 1917–1920.
Account number: Sept. 49–7–23B.
Amount refunded: $———.
Interest: $———.
Stamp: Instruction executed. Stamp here signature collector int. rev.
192 IT:NR:F–5
CEW–4233

Statement In re: Eudora Hull Spalding, Chicago Ill.

1917

Net income before deducting contributions as shown by your books of account			$194,291.04
Less:			
Net income from mining interests as reflected above		$163,201.56	
Receipts from mining interests	$260,072.30		
Depletion allowed	$99,561.20		
Guards and checkers at mine	4,675.84		
	104,237.04		
Corrected net income from mine		155,835.26	
			7,366.30
Balance			$186,924.74
Less: 1917 loss on farm			2,327.60
Corrected net income before deducting contributions			$184,597.14
Less: Contributions, 15% of $184,597.14, which is limit as a deduction			27,689.57
Corrected net income			$156,907.57
Less:			
Dividends		$16,566.39	
Exemption		2,000.00	
			18,566.39

Amount subject to additional normal tax at 2%	$136,341.18
Less: Additional exemption	2,000.00
Amount subject to additional tax at 2%	$136,341.18
Normal tax at 2% on $138,341.18	$2,766.82
Normal tax at 2% on $136,341.18	2,726.82
Total normal tax	$5,493.64
Less: Tax withheld at source on tax-free covenant bonds	27.00
Balance of normal tax due	$5,466.64
Surtax on $156,907.57	27,941.35
Total	$33,407.99

193 *Plaintiff's Exhibit N*

(Check)

Gardner and Carton, 76 West Monroe Street

Harris Trust and Savings Bank 2-28 02

CHICAGO, *Sept. 29, 1924.* No. 6487.

Pay to the order of Mabel G. Reinecke, collector internal revenue, $39,480.22 thirty nine thousand four hundred eighty and no/100 dollars.

GARDNER AND CARTON.

(Stamp:) N. P. Int. Rev. 2-30.

(Canceled perforation:) Paid 10-2-24 2-28.

(Endorsed:) Pay to the order of Federal Reserve Bank of Chicago. Oct. 1, 1924. Mabel G. Reinecke 32, collector. Kent W. Black, cashier, income & profit tax acct.

(Stamped on back:) X 15. Pay to the order of any bank or banker. Prior endorsements guaranteed. Oct. 2-1924. Federal reserve bank of 2-30, Chicago 2-30. Wm. C. Bachman, controller of collections.

194 *Plaintiff's Exhibit O*

(Letterhead)

(A-2 letter)

TREASURY DEPARTMENT,

(Cut) *Washington, November 10, 1920.*

Office of Commissioner of Internal Revenue

Address reply to Commissioner of Internal Revenue and refer to—
IT:SA:NR.
CT:45900.

Mrs. EUDORA HULL SPAULDING,
2626 Prairie Avenue, Chicago, Illinois.

MADAM: An examination of the information submitted in connection with your income-tax return for the year 1918 has resulted in certain changes.

Your corrected net income is $187,628.02 and is subject to tax as follows:

Total net income		$187,628.02
Less: Dividends on stock of corporations		14,846.50
		$172,781.52
Less: Personal exemption		2,000.00
Balance		$170,781.52
Amount subject to tax at 6%		4,000.00
Balance subject to tax at 12%		$166,781.52
Normal tax at 6% on $4,000.00		$240.00
Normal tax at 12% on $166,781.52		20,013.78
Surtax at 1918 rates		70,581.69
Surtax at 1917 rates		155.00
Total tax		$90,990.47
Tax paid at source (2% of $1,350.00)		27.00
Balance of tax		$90,963.47
Tax previously assessed		7,778.92
Additional tax due		$83,184.55

195 The following are the changes which have been made in your return:

Net income has been increased from $45,628.79 to $187,628.02, as follows:

Net income reported		$45,628.79
Block G: Tax on tax-free-covenant bonds added (2% on $1,350.00)		27.00
Block E: Excessive depletion disallowed as follows:		
Depletion deducted	$219,940.43	
Depletion allowed	77,968.20	
		141,972.23
Net income as corrected		$187,628.02

The allowable deduction for depletion for the year 1918 has been computed on the following basis:

The value of the total royalties to be received during life of mines discounted of March 1, 1913, at six per cent and four per cent interest gives a unit value as of March 1, 1913, of $0.0886243 a ton.

Production during the year 1918	879,761 tons.
Depletion deduction for year 1918 ($0.0886243×879761)	$77,968.20

The additional tax as noted above will be assessed at an early date, and notice as to place and time of payment will be sent you by the collector of internal revenue for your district.

Respectfully,

G. NEWTON,
Deputy Commissioner.

196 *Plaintiff's Exhibit P*

(Letterhead)

(Cut) Treasury Department, Washington

Office of Commissioner of Internal Revenue, Income Tax Unit

IT:NRA:F—5
CWA—4233
Mrs. EUDORA HULL SPALDING,
2626 Prairie Avenue,
Chicago, Illinois.

Certificate of overassessment
Number: 159862
Allowed: $10,826.72
Rejected: $———

MADAM: An audit of your income tax return for 1918, Form 1040, and examination of related claim (if any), indicates that the amount of tax assessed to you for this year was in excess of the amount due:

Tax previously assessed, original assessment	$7,778.92	
Additional assessment, January, 1921, page 38, line 0	83,184.55	
		$90,963.47
Total tax liability		80,136.75
Overassessment		$10,826.72

For details, see attached statement.

The amount of the overassessment will be applied as follows:

1. If the tax has not been paid, the amount will be abated by the collector of internal revenue for your district.

2. If the tax has been paid, the amount of the overpayment will either be credited against the tax due (if any) on income returns of years other than that on which the overpayment was made; or

3. The balance (if any) of the overpayment is refunded to
197 you by check of the Treasury Department, forwarded herewith.

Included in the accompanying check is interest in the amount stated below, allowed on the refund or credit, from the date

Respectfully,

E. G. BATSON,
Deputy Commissioner.
By G. ALEXANDER,
Head of Division.

Schedule number, 9606.
District, 1st Ill.
Item 26—sheet 1.
Amount abated, $10,826.72.
Amount credited, $———
Year, 1918–1921, Jan. 38–0–23B.
Account number, ———
Amount refunded, $———
Interest, $———

(Stamp.) Instructions executed stamp here. Signature collector int. rev.

198

Statement

IT:NRA:F–5
CWA–4233

In re: Eudora Hull Spaulding, Chicago, Illinois, 1918

Net income as shown by your books of account			$178,983.18
Net income from mining, reflected above		$138,287.12	
Receipts from mine interests	$219,940.41		
Less:			
Depletion allowed	$84,979.55		
Guards and checkers at mine	3,685.11		
	88,664.66		
Corrected net income from mine		131,275.75	7,011.37
Corrected net income			$171,971.81
Less:			
Exemption		$2,000.00	
Dividends		15,284.00	17,284.00
Balance			$154,687.81
Amount subject to 6% normal tax			4,000.00
Balance subject to 12% normal tax			$150,687.81
Normal tax at 6% on $4,000.			$240.00
Normal tax at 12% on $150,687.81			18,082.54
Surtax at 1918 rates			61,814.21
Total			$80,136.75

199 *Plaintiff's Exhibit Q*

(Check)

Harris Trust and Savings Bank 2-28

CHICAGO, *Sept. 29, 1924.* No. 6476.

Pay to the order of Mabel G. Reinecke, collector internal revenue ---------- $85,502.71

Eighty-five thousand five hundred two and 71/100 dollars

GARDNER AND CARTON.

Gardner and Carton, 76 West Monroe Street

(Perforated:) Paid 10-2-24 2-28.

(Stamp:) N. P. int. rev. 2-30.

(Endorsed:) Pay to the order of Federal reserve bank of Chicago Oct. 1, 1924, Mabel G. Reinecke, 3, collector. Kent W. Black, cashier. Income & profit tax acct. X 15, pay to the order of any bank or banker. Prior endorsements guaranteed. Oct. 2, 1924. Federal Reserve Bank of Chicago, 2-30. 2-30, Wm. C. Bachman, controller of collections.

200 *Plaintiff's Exhibit R*

TREASURY DEPARTMENT
Internal Revenue Service
Form 843—Jan., 1922
Comptroller General U. S.
January 18, 1922

Claim for—

☐ Abatement of tax assessed.
☐ Credit against outstanding assessments.
☒ Refund of taxes illegally collected.
☐ Refund of amounts paid for stamps used in error or excess.

Notice to Collector.

Collector must indicate in block above the kind of claim, except in income tax cases.

Important	Date received by administrative unit. Recorded Apr. 8, 1926	Collector's notation
File with collector of internal revenue where assessment was made. Not acceptable unless completely filled in. 19899	Stamp here	District..... Account number..... Date received: Received 1/21/26. Collector Int. Rev., 1st Dist. Ill. Stamp here

COUNTY OF COOK, } ss: 2723
State of Illinois, }

944269

Type or print

Eudora Hull Spalding
(Name of taxpayer or purchaser of stamps)
C/o Gardner and Carton, 76 W. Monroe St., Chicago, Ill.
(Residence—give street and number as well as city or town and State)

(Business address)

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named,

and that the facts given below with reference to said statement are true and complete:

	Period	Year
1. Business in which engaged		
2. Character of assessment or tax—income tax	From: Jan. 1	1917
	To: Dec. 31	1917

(State for or upon what the tax was assessed or the stamps affixed)

201 3. Amount of assessment or stamps purchased $39,480.22
4. Reduction of tax liability requested (income and profits tax) .....
5. Amount to be abated $36,310.29
6. Amount to be refunded (or such greater amount as is legally refundable ..... $
7. Dates of payment (see collector's receipts or indorsements of canceled checks), September 29, 1924. ..... $36,310.29
(If statement covers income tax liability, items 8–11, inclusive, must be answered.)
8. District in which return (if any) was filed 1st Illinois.
9. District in which unpaid assessment appears.
10. Amount of overpayment claimed as credit $36,310.29
11. Unpaid assessment against which credit is asked; period from ——— to ——— ..... $

Deponent verily believes that this application should be allowed for the following reasons:

Tax as assessed is based upon income received from royalties from iron ore mines. Depletion amounting to $99,561.20 was allowed to taxpayer, whereas depletion amounting to $203,510.86 should be allowed. The latter amount is the present worth of the ore mined in 1917, as of March 1, 1913, and is arrived at by discounting the amount received in 1917 at 5% to March 1, 1913.

(Stamp:) Received Apr. 7, 1926, claims control section.

(Attach additional sheets if necessary)

(Signed) EUDORA HULL SPALDING.

Sworn to and subscribed before me this 16th day of January, 1926.

[SEAL.] JAY T. JUDD, *Notary Public.*
(Title)

(This affidavit may be sworn to before a deputy collector of internal revenue or revenue agent without charge)

202 Certificates

M H 5/18/26

I certify that an examination of the records of the Bureau of Internal Revenue shows the following facts as to the assessment and payment of the tax:

Schedule No.

Name of taxpayer	Character of assessment and period covered	List	Year	Month	Page	Line	Amount	Date paid	District in which paid
Eudora Hull Spalding.	Income 1917. "	IT.... 23B....	1918 1920	Feb... Sept..	2078 49	2 7	$598.85 12,878.41 32,909.14	6/26/18..... Abt ITA.. 10/1/24.....	1st. 9717

12878.41 Abt ITA 9717

J. G.
MABEL G. REINECKE,
Collector of Internal Revenue.

_____ _____,
Assessment Clerk, Commissioner's Office.

I certify that the records of my office show the following facts as to the purchase of stamps:

Claim No.

To whom sold or issued	Kind	Number	Denomination	Date of sale or issue	Amount	If special tax stamp, state— Serial number	If special tax stamp, state— Period commencing—

Claim No.

_____
Collector _____, District _____

Schedule No.

Schedule number _____ District _____
Allowed or rejected number_____ _____
(Nature of tax)

Claimant_____
Address_____

(Stamp.) Rejected 5349 I. T. Schedule.
KB R-1 5/7/26 Examined and submitted for action_____, 19____

Claim examined by— M. W.
Claim approved by—
Chief of Division.

Committee on claims

Amount claimed..... $36,310.29 _____
Amount allowed..... $_____ _____
Amount rejected..... $36,310.29 _____

203 *Plaintiff's Exhibit S*

TREASURY DEPARTMENT
Internal Revenue Service
Form 843—Jan., 1922
Comptroller General U. S.
January 18, 1922

Claim for—

- ☐ Abatement of tax assessed.
- ☐ Credit against outstanding assessments.
- ☒ Refund of taxes illegally collected.
- ☐ Refund of amounts paid for stamps used in error or excess.

Notice to Collector:

Collector must indicate in block above the kind of claim, except in income-tax cases.

Important	Date received by administrative unit	Collector's notation
File with collector of internal revenue where assessment was made. Not acceptable unless completely filled in. 19598	Recorded Mar. 17, 1926 Stamp here	District..... Account number..... Date received: Received 1/21/26 Collector Int. Rev., 1st Dist. Ill. Stamp here ..... Collector of Internal

STATE OF ILLINOIS, 2723
County of Cook, ss:
936325 Claims control section

Type or print

Eudora Hull Spalding.
(Name of taxpayer or purchaser of stamps)
C/o Gardner and Carton, 76 W. Monroe St., Chicago, Ill.
(Residence—give street and number as well as city or town and State)

(Business address)

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

	Period	Year
1. Business in which engaged.....		
2. Character of assessment or tax—income tax.....	From: Jan. 1 To: Dec. 31	1918 1918

(State for or upon what the tax was assessed or the stamps affixed)

204 3. Amount of assessment or stamps purchased..... $85,502.71
4. Reduction of tax liability requested (income and profits tax)..... $62,767.52
5. Amount to be abated..... $.....
6. Amount to be refunded (or such greater amount as is legally refundable)..... $62,767.52

7. Dates of payment (see collector's receipts or indorsements of canceled checks), Sept. 29, 1924.
(If statement covers income-tax liability, items 8–11, inclusive, must be answered.)
8. District in which return (if any) was filed 1st Illinois.
9. District in which unpaid assessment appears.
10 Amount of overpayment claimed as credit $62,767.52
11. Unpaid assessment against which credit is asked; period from ------ to ------ ..... $------

Deponent verily believes that this application should be allowed for the following reasons:

Tax as assessed is based upon income received from royalties from iron ore mines. Depletion amounting to $84,979.55 was allowed to taxpayer, whereas depletion amounting to $161,299.31 should be allowed. The latter amount is the present worth of the ore mined during 1918, as of March 1, 1913, and is arrived at by discounting the amount received in 1918 at 5% to March 1, 1913.

(Stamp:) Received Mar. 11, 1926, claims control section.

(Attach additional sheets if necessary)

(Signed) EUDORA HULL SPALDING.

Sworn to and subscribed before me this 16th day of January, 1926.

[SEAL.] JAY T. JUDD, *Notary Public.*
(Title)

(This affidavit may be sworn to before a deputy collector of internal revenue or revenue agent without charge)

205 Certificates

M H 5/18/26

I certify that an examination of the records of the Bureau of Internal Revenue shows the following facts as to the assessment and payment of the tax:

Name of taxpayer	Character of assessment and period covered	List	Year	Month	Page	Line	Amount	Date paid	District in which paid	Claim No.
Eudora Hull Spalding.	Income 1918. 1918.	23B... 27.....	1921 1919	Jan...	38 3139	0 33	$83,184.55 7,778.92	....	....	

J. G.
MABEL T. REINECKE,
Collector of Internal Revenue.

Assessment Clerk, Commissioner's Office.

I certify that the records of my office show the following facts as to the purchase of stamps:

Claim No.	To whom sold or issued	Kind	Number	Denomination	Date of sale or issue	Amount	If special tax stamp, state— Serial number	If special tax stamp, state— Period commencing—	Schedule No.

Collector ------ *District* ------

Schedule number ---------- District ----------
Allowed or rejected number ------ ----------
(Nature of tax)

Claimant ----------
Address ----------
Examined and submitted for action ----------, 19----
(Stamp.) Rejected 5349 I. T. Schedule.

Schedule No.

Claim examined by— M W		Committee on claims
Claim approved by—	Amount claimed--- $62,767.52	----------
----------	Amount allowed--- $----------	----------
Chief of Division.	Amount rejected- $62,767.52	----------

206 *Plaintiff's Exhibit T*

(Cut) Treasury Department, Washington

Office of Commissioner of Internal Revenue

Address reply to
Commissioner of Internal Revenue
and refer to
IT:PA:PYA
ARM

MAY 12, 1926.

MRS. EUDORA HULL SPALDING,
% Gardner and Carton,
76 W. Monroe Street, Chicago, Illinois.

MADAM: Your claim for refund of $36,310.29 individual income taxes for the year 1917 has been examined.

The claim is based on the statement that the depletion allowed in the former audit of the return was insufficient.

You are advised in this connection that section 284(g) of the revenue act of 1926 provides that "If the taxpayer has within five years from the time the return for the taxable year 1917 was due filed a waiver of his right to have the taxes due for such taxable

year determined and assessed within five years after the return was filed, then a credit or refund relating to the taxes for the year in respect of which the waiver was filed shall be allowed or made if a claim therefor is claimed either on or before April 1, 1925, or within four years from the time the tax was paid."

Inasmuch as no waiver or claim was filed by you within the required periods, the claim will be rejected. The rejection will officially appear in the next schedule to be approved by the commissioner.

Respectfully,

C. R. NASH,
Assistant to the Commissioner.
By A. LEWIS,
Head of Division.

207 *Plaintiff's Exhibit U*

(Cut) Treasury Department, Washington

Office of Commissioner of Internal Revenue

Address reply to
Commissioner of Internal Revenue
and refer to
IT:PA:PYA
ARM

MAY 12, 1926.

MRS. EUDORA HULL SPALDING,
% Gardner and Carton,
76 W. Monroe Street, Chicago, Illinois.

MADAM: Your claim for refund of $62,767.52 individual income tax for the year 1918 has been examined.

The claim is based on the statement that the depletion allowed in the former audit of the return was insufficient.

You are advised in this connection that section 284(g) of the revenue act of 1926 provides that—

"If a taxpayer has on or before June 15, 1924, filed a waiver in respect to the tax due for the taxable year 1918, then credit for refund relating to the taxes for the year in which the waiver was filed shall be allowed or made if claim therefore is filed either on or before April 1, 1925, or within four years from the time the tax was paid."

Inasmuch as no waiver or claim was filed by you within the required periods, the claim will be rejected. The rejection will officially appear in the next schedule to be approved by the commissioner.

Respectfully,

C. R. NASH,
Assistant to the Commissioner.
By ——— ———,
Head of Division.

208 *Plaintiff's Exhibits V and W and X in evidence*

10/31/1924.

Present value March 1, 1913, i. e. the sum which placed at interest on that date, at the rate of 5% per annum, simple interest, will produce the accumulated sum on the later date specified	0.2095	69,251.05
Simple interest for 3 years	.0315	10,387.65
" " " 315 days	.0090	2,988.23
Accumulated sum January 10, 1917, royalty paid	0.25	82,626.93
Present value March 1, 1913	0.2074	10,153.29
Simple interest for 4 years	.0415	2,030.66
" " " 40 days	.0011	55.63
Accumulated sum April 10, 1917, royalty paid	0.25	12,239.58
Present value March 1, 1913	0.2063	47,434.55
Simple interest for 4 years	.0410	9,486.91
" " " 131 days	.0037	851.22
Accumulated sum July 10, 1917, royalty paid	0.25	57,772.68
Present value March 1, 1913	0.2032	87,791.42
Simple interest for 4 years	.0406	17,558.28
" " " 223 days	.0062	2,681.85
Accumulated sum October 10, 1917, royalty paid	0.25	108,031.55
Present value March 1, 1913	0.2011	50,778.82
Simple interest for 4 years	.0402	10,155.76
" " " 315 days	.0087	2,191.14
Accumulated sum January 10, 1918, royalty paid	0.25	63,125.72
Present value March 1, 1913	0.1991	9,748.90
Simple interest for 5 years	.0498	2,437.22
" " " 40 days	.0011	53.42
209 Accumulated sum April 10, 1918, royalty paid	0.25	12,239.54
Present value March 1, 1913	0.1972	43,607.14
Simple interest for 5 years	.0493	10,901.78
" " " 131 days	.0035	782.54
Accumulated sum July 10, 1918, royalty paid	0.25	55,291.46
Present value March 1, 1913	0.1952	69,687.87
Simple interest for 5 years	.0488	17,421.97
" " " 223 days	.0060	2,128.82
Accumulated sum October 10, 1918, royalty paid	0.25	89,238.66

(Endorsed:) * * * (Caption) * * * Bill of exceptions. Filed Jul. 13, 1928, at ____ o'clock ____m. Charles M. Bates, clerk. George E. Q. Johnson, United States attorney.

In United States District Court

Order approving bill of exceptions

July 13, 1928

This day comes the defendant by her attorney and presents herein the defendant's bill of exceptions which bill of exceptions is approved and signed by the court and ordered by the court to be filed by the clerk of this court.

210 In United States District Court

Notice of appeal

Filed July 13, 1928

To: ZANE, MORSE AND NORMAN,
JOHN M. ZANE,
Rm. 709, 111 W. Monroe St., Chicago, Illinois,
GARDNER & CARTON,
HENRY G. GARDNER,
URBAN A. LAVERY,
ALFRED T. CARTON,
Rm. 1030, 33 South Clark St., Chicago, Illinois,
Attorneys for Plaintiff.

The defendant, Mabel G. Reinecke, collector of internal revenue for the first district of Illinois, hereby serves her notice that she appeals from the decision or judgment entered in the above-entitled cause on May 8, 1928. This notice is given in conformity with the provisions of the act of Congress approved January 31, 1928.

GEORGE E. Q. JOHNSON,
United States Attorney for the
Northern District of Illinois.

Received a copy of the above and foregoing notice of appeal this 13th day of July, 1928.

ZANE, MORSE & NORMAN,
JOHN M. ZANE,
GARDNER & CARTON,
HENRY A. GARDNER,
URBAN A. LAVERY,
ALFRED T. CARTON,
Attorneys for Plaintiff.

211 In United States District Court

Notice of appeal

Filed July 13, 1928

To: ZANE, MORSE AND NORMAN,
JOHN M. ZANE,
Rm. 709, 111 W. Monroe St., Chicago, Illinois,
GARDNER & CARTON,
HENRY G. GARDNER,
URBAN A. LAVERY,
ALFRED T. CARTON,
Rm. 1030, 33 South Clark St., Chicago, Illinois,
Attorneys for Plaintiff.

You, and each of you, are hereby notified that on Friday, July 13, 1928, at the opening of court in the forenoon, or as soon thereafter

as counsel can be heard, I shall appear before his honor, Judge James H. Wilkerson, in the room regularly occupied by him as a courtroom in the Federal Building, Chicago, Illinois, and ask leave of court to file the petition of Mabel G. Reinecke, defendant, for an appeal, together with an assignment of errors, and shall enter the motion of the defendant, Mabel G. Reinecke, collector of internal revenue for the first district of Illinois, for the issuance and allowance of an appeal directed to the United States Circuit Court of Appeals for the Seventh Circuit, and for the issuance of a citation to the above-named plaintiff in accordance with said appeal, and shall also enter a motion for the entry of an order that the original bill of exceptions in the above-entitled cause may be incorporated in the record on appeal to the United States Circuit Court of Appeals for the Seventh Circuit in this cause in lieu of a copy thereof, at which time and place you may appear if you so desire.

GEORGE E. Q. JOHNSON,
United States Attorney,
Attorney for Defendant.

212 Received a copy of the above and foregoing notice this 12th day of July, A. D. 1928.

ZANE, MORSE & NORMAN,
JOHN M. ZANE,
GARDNER & CARTON,
HENRY A. GARDNER,
URBAN A. LAVERY,
ALFRED T. CARTON,
Attorneys for Plaintiff.

[File indorsement omitted.]

In United States District Court

Petition for appeal

Filed July 13, 1928

Now comes Mabel G. Reinecke, collector of internal revenue for the first district of Illinois, the defendant, by her attorney, George E. Q. Johnson, United States Attorney for the northern district of Illinois, and respectfully shows that on the eighth day of May, A. D. 1928, the court directed a verdict against your petitioner and in favor of Eudora Hull Spalding, plaintiff, and upon said verdict a final judgment was entered on the eighth day of May, A. D. 1928, against your petitioner.

Your petitioner feeling herself aggrieved by said verdict and judgment entered thereon as aforesaid, and pursuant to to authority and direction of the Attorney General of the United States, herewith petitions the court for an order allowing her to prosecute and appeal to the United States Circuit Court of Appeals for the Seventh Circuit under the laws of the United States in such cases made and provided.

Wherefore, premises considered, your petitioner prays that an appeal in this behalf be allowed to the United States Circuit Court of Appeals for the Seventh Circuit, sitting at Chicago, Illinois, in said circuit, for the correction of the errors complained of and herewith assigned, and that an order be entered allowing said
213 appeal without bond of the defendant, it appearing that the above-entitled cause is one in which the United States is the real party in interest in said cause and that said petition for appeal is filed pursuant to the authority and direction of the Attorney General of the United States.

GEORGE E. Q. JOHNSON,
United States Attorney for the Northern District of Illinois.

Dated at Chicago, Illinois, this 13th day of July, 1928.
[File indorsement omitted.]

In United States District Court

Assignment of errors

Filed July 13, 1928

Now comes the defendant, Mabel G. Reinecke, collector of internal revenue for the first district of Illinois, by George E. Q. Johnson, United States Attorney for the Northern District of Illinois, her attorney, and by direction and authority of the Attorney General of the United States, is about to file a petition for an appeal from the decision and judgment of this court rendered on the eighth day of May, A. D. 1928, in the above-entitled cause, and in connection with her petition for appeal says that in the record proceedings and in the final decision and judgment aforesaid, manifest error has intervened to the prejudice of the defendant, to wit:

1. Said District Court erred in directing a verdict for the plaintiff.

2. Said District Court erred in refusing to direct a verdict for the defendant.

3. Said District Court erred in granting the motion of the plaintiff to direct a verdict for the plaintiff.

4. Said District Court erred in refusing to grant the motion of the defendant to direct a verdict for the defendant.

214 5. The action of the District Court in instructing the jury to return a verdict for the plaintiff was against the law.

6. Said District Court erred in refusing to hold as a matter of law that a reasonable allowance to the plaintiff in this cause for the depletion of the respective mines should be computed by dividing the estimated ore reserve tonnage on March 1, 1913, of each mine into the fair market value as of March 1, 1913, of the plaintiff's interest in said mine, and multiplying the dividends so obtained by

the total tons of ore extracted from each mine, respectively, on which royalties were paid to the plaintiff during the taxable year for which the depletion allowance is claimed, provided that the aggregate of the allowances for the year 1917 does not exceed the fair market value in the mine of the ore which was mined and sold during that year, and provided further that the aggregate of the allowances made for previous years plus the amount of the allowance made for the year in question does not exceed the fair market value as of March 1, 1913, of the plaintiff's interest in the mine.

7. Said District Court erred in entering judgment for the plaintiff.

8. Said District Court erred in refusing to enter judgment for the defendant.

9. Said District Court erred in denying defendant's motion for a new trial.

10. Said District Court erred in denying defendant's motion in arrest of judgment.

Wherefore, defendant, plaintiff in error, prays that the judgment of the said District Court be reversed, etc.

GEORGE E. Q. JOHNSON,
United States Attorney for the
Northern District of Illinois,
Attorney for Defendant.

Dated at Chicago, Illinois, this 13th day of July, A. D. 1928.

Of counsel.

DWIGHT H. GREEN,
Special Assistant United States Attorney.
THOMAS H. LEWIS,
Special Attorney, Bureau of Internal Revenue.

215 In United States District Court

Order allowing appeal

July 13, 1928

This cause coming on to be heard this thirteenth day of July, A. D. 1928, on the petition of Mabel G. Reinecke, collector of internal revenue for the first district of Illinois, defendant, and the said defendant appearing by her attorney, George E. Q. Johnson, United States attorney for the Northern District of Illinois, for an order allowing her to prosecute an appeal to the United States Circuit Court of Appeals for the Seventh Circuit and an assignment of errors accompanying the said petition, and it appearing that notice of this proceeding has been given to the plaintiff:

It is ordered in open court that the prayer of said petitioner be, and it is hereby, allowed, and the appeal prayed for by said petitioner is hereby granted and allowed without bond of the defendant,

it appearing that the above-entitled cause is one in which the United States is the real party in interest in said cause, and this appeal being taken by the direction and authority of the Attorney General of the United States of America.

Enter:

JAMES H. WILKERSON,
Judge of the District Court of the United States for the Northern District of Illinois, Eastern Division.

216 *Notice of filing præcipe*

Filed July 17, 1928

To: ZANE, MORSE & NORMAN,
JOHN M. ZANE,
Rm. 709, 111 W. Monroe St., Chicago, Illinois.
GARDNER & CARTON,
HENRY A. GARDNER,
URBAN A. LAVERY,
ALFRED T. CARTON,
Rm. 1030, 33 S. Clark St., Chicago, Illinois,
Attorneys for Plaintiff.

You, and each of you, are hereby notified that I have this 17th day of July, 1928, filed with the clerk of the United States District Court for the Northern District of Illinois, Eastern Division, in the above-entitled cause, a præcipe for transcript of record, a copy of which said præcipe is attached hereto.

GEORGE E. Q. JOHNSON,
United States Attorney for the Northern District of Illinois,
Attorney for Defendant.

Received a copy of the above, and foregoing notice, together with a copy of the præcipe mentioned therein, this 17th day of July, A. D. 1928.

ZANE, MORSE & NORMAN,
JOHN M. ZANE,
GARDNER & CARTON,
HENRY A. GARDNER,
ALFRED T. CARTON,
URBAN A. LAVERY,
Attorneys for Plaintiff.

217 In United States District Court

Præcipe for transcript of record

To CHARLES M. BATES, Esq.,
Clerk of the District Court of the United States for the Northern District of Illinois, Eastern Division.

You will please prepare transcript of record in the above-entitled cause to be filed in the office of the clerk of the United States Circuit Court of Appeals for the Seventh Circuit under the appeal heretofore allowed in said cause, and include in said transcript the following:

1. Placita.
2. Declaration.
3. Plea of Defendant.
4. Motion by defendant on May 3, 1928, for instructed verdict.
5. Motion by plaintiff on May 3, 1928, for instructed verdict.
6. Order of May 4, 1928, overruling defendant's motion for instructed verdict.
7. Order of May 4, 1928, overruling plaintiff's motion for instructed verdict.
8. Order of May 4, 1928, giving leave to plaintiff to amend declaration on its face.
9. Motion of defendant on May 4, 1928, for directed verdict.
10. Motion of plaintiff on May 4, 1928, for directed verdict.
11. Order of May 8, 1928, overruling defendant's motion for directed verdict.
12. Order of May 8, 1928, sustaining plaintiff's motion for directed verdict.
13. Verdict.
14. Judgment.
15. Motion by defendant for new trial and order overruling the same.
16. Motion by defendant in arrest of judgment and order overruling the same.
17. Order granting sixty days for bill of exceptions.
18. Stipulation regarding bill of exceptions.

218 19. Order extending time to present and settle bill of exceptions and to have same approved and filed to and including August 6, 1928.

20. Bill of exceptions.
21. Order of July 13, 1928, regarding original bill of exceptions.
22. Notice of petition for appeal, etc.
23. Petition for appeal.
24. Assignment of errors.
25. Order allowing appeal without bond.
26. Notice of appeal.
27. Citation with acknowledgment of service.

28. Præcipe for transcript of record.
29. Notice of filing præcipe.
30. Clerk's certificate.

Said transcript is to be prepared as required by law and the rules of the United States Circuit Court of Appeals for the Seventh Circuit.

GEORGE E. Q. JOHNSON,
United States Attorney for the
Northern District of Illinois,
Attorney for Defendant.

[Clerk's certificate to foregoing transcript omitted in printing.]

219 [Citation in usual form showing service on Zane, Morse & Norman et al., filed July 13, 1928, omitted in printing.]

220 [Appearances of counsel omitted in printing.]

221 In United States Circuit Court of Appeals, Seventh Circuit

4074

MABEL G. REINECKE, COLLECTOR, ETC. vs. EUDORA HULL SPALDING — Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

Order extending time

Sept. 4, 1928

Upon motion of appellant by her attorney, George E. Q. Johnson, United States attorney, it is hereby ordered that the time for the appellant to file her brief in the above-entitled cause be extended to and including September 14, 1928.

In United States Circuit Court of Appeals

Order setting cause

Oct. 2, 1928

222 On motion of counsel for appellee it is ordered by the court that this cause be placed on the calendar for the October session of the October term, 1928, of this court; and it is further ordered that this cause be set down for hearing on Friday, October 26, 1928.

[Minute entry of argument and submission Oct. 26, 1928, omitted in printing.]

223 In United States Circuit Court of Appeals

[Title omitted.]

Judgment

Jan. 2, 1929

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed, with interest allowed by law.

224 In United States Circuit Court of Appeals for the Seventh Circuit

October term, 1928; January session, 1929

No. 4074

MABEL G. REINECKE, COLLECTOR, APPELLANT, vs. EUDORA HULL SPALDING, APPELLEE.	Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

Opinion

Filed January 2, 1929

Before EVANS, PAGE, and ANDERSON, Circuit Judges

Opinion by PAGE, Cir. J.:

The leases, for iron ore bearing lands, in this case, were involved in McHale v. Hull, 16 Fed. (2d) 781, and were made by appellee in that case and by plaintiff (appellee) here, and others, as lessors. The following matters present in this case are not found in the McHale Case: (a) A properly authenticated bill of exceptions; (b) a jury trial; (c) each party asked an instructed verdict.

A verdict was directed for plaintiff, who sued to recover an alleged excess of taxes, paid under protest, for the years 1917 and 1918, on her income under those leases.

225 There were seven leases made, one in 1901, four in 1902, one in 1903, and one in 1905, for the mining of iron ore from lands in Minnesota, in which plaintiff owned a one-sixth interest. The compensation to lessors was a royalty of 25 cents per ton, payable quarter-annually. No lease was for a longer term than 50 years. Under the 1905 lease the term, as to several tracts, was 45 years, but as to one tract was 50 years. Under the 1903 lease the term was 25 years. Under one 1902 lease the term was 50 years for mining five-sixths, but for mining a certain described one-sixth was for only 25 years. The provisions as to the annual minimum to mined varied. Several, if not all of the leases, gave the lessees the right to cancel on 30 days' notice.

The sole controversy is over the correctness of the Government's method of arriving at the value of the iron ore in the ground on March 1, 1913, a matter not covered by the revenue acts in question, nor by any regulation of the Treasury Department.

The only thing the Government's one witness testified to was the general custom in the mining business with reference to determining allowance for depletion. In response to a question by the court, he said that in making such determination they assumed that the value of the mineral in place had been arrived at—that is to say, they assumed the very thing here in controversy.

For plaintiff, several witnesses testified, and their qualification is not questioned, that the March 1, 1913, value of the ore in place was over 25 cents per ton.

The Government's case is based upon several assumptions: First, it assumed the number of tons of ore in place on March 1, 1913, and the correctness of that assumption is not controverted; second, it states the average tonnage mined in the years 1913 to 1918, inclusive; third, applying that average, it assumes that the whole tonnage will be mined in 40 years, and that plaintiff's one-sixth interest in the leases will yield her in 40 years, at 25 cents per ton, $7,849,287.18. And, therefore, the Government says the way to arrive at the market value on March 1, 1913, of the ore in place is to find the March 1, 1913, value of the $7,849,287.18 to be paid, as assumed, over a period of 40 years. By that process, the value of one ton of ore in place on March 1, 1913, was found to be .0886243, and the whole value of plaintiff's one-sixth interest, as of that date, was found to be $2,782,551.64. The Government's figures and processes are set
226 out in a letter to plaintiff, pertinent portions of which are as follows (numerals at left are ours):

Ore reserve, March 1, 1913, according to the Minnesota Tax Commission, as shown on questionnaire of the Royalty Mineral Association	tons	191,417,150
Less: Advance royalty payment by lessees, prior to March 1, 1913, on	tons	3,034,258
(1) Net tonnage as of March 1, 1913		188,382,892
(2) Your interest, one-sixth, March 1, 1913	tons	31,397,148.7
(3) Total average extraction, 1913 to 1918, inclusive	tons	4,770,000
(4) Maximum life of mine allowed	years	40
(5) Interest rate allowed		6%
(6) Royalty rate per ton		$0.25
(7) Your capital sum returnable in 40 years		$7,849,287.18
(8) Present worth of your interest, March 1, 1913		$2,782,551.64
(9) Unit cost per ton, March 1, 1913, basis for depletion		$0.0886243
(10) Depletion in 1916, 1,096,015.4 tons at $0.0886243		$97,133.60
(11) Depletion in 1917, 1,040,280.4 tons at $0.0886243		$92,194.92

We are of opinion that the Government's method of arriving at the March 1, 1913, value of the ore in place is wrong for many reasons, some of which are—

(a) The assumption that the value of the leases to plaintiff, at the end of 40 years, will be $7,849,287.18 is far from correct. That is only the principal she will receive for her one-sixth interest within the time taken to mine the whole of the ore. The leases were

and are worth, also, the interest upon the payments made quarterly over the mining period. As shown by the letter, supra, there were mined in each year, 1916 and 1917, in excess of 1,000,000 tons, from which she received, each year, in excess of $250,000. At 5% that would double in 20 years, and in 40 years would be worth to her nearly three-quarters of a million dollars. All interest would be in excess of the $7,849,287.18. On the Government theory it would take all interest to make that amount.

(b) It is reasonably probable that where there is a large body of ore to be mined, extending over a term of years, the amount mined annually would vary greatly, being governed by the equipment employed, the market demands, and prices, and oftentimes by the fact that the lessee had, or did not have, requisite capital to operate the mines. For those reasons, the average extraction for the years 1913 to 1918 would, in all probability, be no fair basis for arriving at an average during the whole term. That this is so, is evidenced by the fact that the tonnage, shown by the letter to have been mined in 1916 and 1917—two of the six years used by the Government as the basis for arriving at the term of 40 years—
227 would reduce the Government's theoretical period of 40 years by one-fourth, so that plaintiff's whole tonnage at the 1916 and 1917 average would be mined in 30 years, thereby, on the Government's theory, very materially increasing the market value on March 1, 1913; 45% of the amount mined in those six years were mined in the two years, 1916 and 1917, so that the average for the other four years was less than 700,000 tons.

(c) With the exception of tract 6, which may be mined under the lease made in 1905 within 50 years, there is no lease that runs for a term of 40 years after March 1, 1913. Under the 1901 lease one-sixth had to be mined out in 25 years. The 1903 lease was made for a term of 25 years. So that the estimated period of 40 years extends far beyond the time permitted by the leases and within which plaintiff would have received all of her money if all the ore had been mined.

(d) The right to mine under the leases was not a sale of the iron ore. The leases here in question are similar to, if not identical in form with, the leases involved in a number of cases in the Supreme Court, one of which is VonBaumbach *v.* Sargent Land Co., 242 U. S. 503. The Government there contended that the payments for ore mined under the leases were income within the meaning of the Act of 1909, and did not represent the conversion of the investment of the corporations from ore into money, as contended by the land company. The court adverted to the fact that in Pennsylvania the contracts were leases in name only, but were in fact conveyances of the ore in place as part of the realty, and that the so-called royalties merely represented payment for so much of the land, and were in no just sense income, but were conversions of the capital. The court pointed out that under the Minnesota decisions there is no sale under such contracts. It was found not necessary to decide

as between the Pennsylvania and the Minnesota cases, because the court found that the royalties were income within the meaning of the 1909 revenue act.

United States *v.* Biwabak Mining Co., 247 U. S. 116, was also under the act of 1909. In that case, the court said that the Circuit Court of Appeals had distinguished the case before it from the Sargent Land Co. Case, and pointed out that the Circuit Court of Appeals concluded by saying:

"We therefore think that applying the principle of the
228 Sargent Case results in holding that these receipts were from the sale of capital assets and not from income."

The Supreme Court said it did not agree with the Circuit Court of Appeals as to the effect of the Sargent Land Company Case, and concluded:

"The lessee takes from the property the ore mined, paying for the privilege so much per ton for each ton removed. * * * He is, as we held in the Sargent Land Co. case, in no legal sense a purchaser of ore in place."

Lynch v. Alworth-Stevens Co., 267 U. S. 364, involved a tax under the 1917 revenue act, one of the acts here in question, and the holding was that there was no conveyance of the title to ore in place.

The leases might have been cancelled at any time, and it is evident, for many reasons, that there was no sale of the ore when the leases were made.

Section 5 (Eighth-b) of the revenue act of 1916 (39 U. S. Stats. at L., p. 756, 759) provides that there shall be an allowance for depletion "not to exceed the market value in the mine of the product thereof, which has been mined and sold during the year or which the return and computation are made." This language, by its terms, has nothing to do with the whole body of the ore in place. It is not related to the market value of all of the tonnage in the mine, but the depletion relates to the market value in the mine of the product mined and sold during the year for which the return is made.

If the amount mined in 1916 was ever sold, so far as this taxing question is concerned it was sold in 1916, and if it then had a price that price was 25 cents per ton royalty then paid plaintiff. And the same is true as to every year. If it had all been mined in 1913, unquestionably the market value would have been 25 cents per ton. It cannot be possible that the 1913 value can be fixed by the lease at .0886243 and at the same time have the lease yield to plaintiff 25 cents per ton for 1913 and every succeeding year of operation. There could be no increase in value because the price paid was fixed by the lease prior to 1913. A royalty of that kind, when paid, is a payment for iron ore. In Burke Co. v. Lawson, 151 S. W. 657, the Court of Appeals of Kentucky said:

"The 'royalty' is is the price paid for the coal as it lies in the earth. That is what it sells for."

It seems clear that the ore mined in 1916 was worth to plaintiff 25 cents per ton, that that price continued two elements, mine depletion and profit, and that the way of arriving at the profit was to take the fair cash market value on March 1, 1913, of the tonnage mined in 1916 (which was shown to be 25 cents per ton) less the interest carrying charge of 5% from March 1, 1913, to 1916.

It seems to us that the impossibility of applying the Government's theory may be illustrated by the following: Assume that of the seven leases in question all of the provisions were identical, except that six of the leases were for one, two, three, four, five, and six years, respectively, and the seventh was for 40 years, and that from each tract during the first year there were mined one million tons of iron. It must be clear that, on the Government's theory, the ore in place on March 1, 1913, although of like kind and quality, would, under each lease, have a materially different value from that covered by the other leases. Under the one-year lease the value of the ore would be 25 cents per ton, and under the 40-year lease it would be less than one cent per ton.

We are of opinion that appellant's method of arriving at the market value of the ore in question on March 1, 1913, is unsound in principle, and in any event is based upon too many uncertainties and assumptions to be of any reliable use in ascertaining the value.

The judgment should be, and is, affirmed.

230 In United States Circuit Court of Appeals

[Title omitted.]

Stipulation re stay of mandate

Filed Jan. 17, 1929

It is hereby stipulated and agreed by and between the parties to the above-entitled cause by their respective counsel that the mandate in said cause shall be stayed to and including March 1, 1929.

GEORGE E. Q. JOHNSON,
Counsel for Appellant.
JOHN M. ZANE,
CHARLES F. MORSE,
HAROLD W. NORMAN,
HENRY GARDNER,
Counsel for Appellee.

[File indorsement omitted.]

In United States Circuit Court of Appeals

[Title omitted.]

Order staying mandate

Jan. 17, 1929

Pursuant to the filing of stipulation of counsel it is now here ordered that the mandate of this court be, and the same is hereby, stayed to and including March 1, 1929.

231 In United States Circuit Court of Appeals

[Title omitted.]

Stipulation re stay of mandate

Filed Feb. 26, 1929

It is hereby stipulated and agreed by and between the parties to the above-entitled cause, by their respective counsel, that the mandate in said cause shall be stayed to and including April 1, 1929.

GEORGE E. Q. JOHNSON,
Counsel for Appellant.
HENRY A. GARDNER,
JOHN M. ZANE,
CHARLES F. MORSE,
HAROLD W. NORMAN,
Counsel for Appellee.

[File indorsement omitted.]

In United States Circuit Court of Appeals

[Title omitted.]

Order staying mandate

Feb. 26, 1929

Pursuant to filing of a stipulation of counsel it is now here ordered that the mandate in this cause be, and the same is hereby, stayed until and including April 1, 1929.

232 [Clerk's certificate to foregoing transcript omitted in printing.]

234 Supreme Court of the United States

Order allowing certiorari

Filed April 29, 1929

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Indorsement on cover:] File No. 34,108. United States Circuit Court of Appeals, Seventh Circuit. Term No. 799. Mabel G. Reinecke, collector of internal revenue for the first district of Illinois, petitioner, vs. Eudora Hull Spalding. Petition for writ or certiorari and exhibit thereto. Filed March 30th, 1929. File No. 34,108.

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No. 59

In the Supreme Court of the United States

OCTOBER TERM, 1928

MABEL G. REINECKE, COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF ILLINOIS, PETITIONER

v.

EUDORA HULL SPALDING

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

U. S. GOVERNMENT PRINTING OFFICE: 1929

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In the Supreme Court of the United States

OCTOBER TERM, 1928

No. —

MABEL G. REINECKE, COLLECTOR OF INTERNAL REVENUE for the First District of Illinois, petitioner

v.

EUDORA HULL SPALDING

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

PETITION

The Attorney General on behalf of Mabel G. Reinecke, Collector of Internal Revenue for the First District of Illinois, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Seventh Circuit entered in the above case on January 2, 1929, affirming the judgment of the District Court of the United States for the Northern District of Illinois.

QUESTION PRESENTED

The question in this case is whether a taxpayer may compute the allowances which the statute per-

mits for depletion of interests in mines in a manner not provided for in the regulations made pursuant to statutory authority, substituting in place thereof the value in the ground of the specific ore extracted during the year for which the computation is made, disregarding wholly the March 1, 1913, value of the taxpayer's interests in the mines and the relation between that value and the total reserves.

STATUTES AND REGULATIONS INVOLVED

This action being brought to recover taxes for two years, the provisions of two Acts are involved. Taxes for the year 1917 are to be computed under the Revenue Act of 1917 (c. 63, 40 Stat. 300) and the Revenue Act of 1916 (c. 463, 39 Stat. 756), and specifically under Section 5 (a) (c. 463, 39 Stat. 756, 759), which reads, so far as material, as follows:

> That in computing net income in the case of a citizen or resident of the United States—
>
> (a) For the purpose of the tax there shall be allowed as deductions—
>
> * * * * *
>
> Eighth. (a) In the case of oil and gas wells a reasonable allowance for actual reduction in flow and production to be ascertained not by the flush flow, but by the settled production or regular flow; (b) in the case of mines a reasonable allowance for depletion thereof not to exceed the market value in the mine of the product thereof, which has been mined and sold during the year for which the return

and computation are made, such reasonable allowance to be made in the case of both (a) and (b) under rules and regulations to be prescribed by the Secretary of the Treasury: *Provided,* That when the allowances authorized in (a) and (b) shall equal the capital originally invested, or in case of purchase made prior to March first, nineteen hundred and thirteen, the fair market value as of that date, no further allowance shall be made. No deduction shall be allowed for any amount paid out for new buildings, permanent improvements, or betterments, made to increase the value of any property or estate, and no deduction shall be made for any amount of expense of restoring property or making good the exhaustion thereof for which an allowance is or has been made.

Taxes for the year 1918 (c. 18, 40 Stat. 1057, 1067) are controlled by the Revenue Act of 1918, which provides in part as follows:

> SEC. 214. (a) That in computing net income there shall be allowed as deductions:
>
> * * * * *
>
> (10) In the case of mines, oil and gas wells, other natural deposits, and timber, a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions in each case, based upon cost including cost of development not otherwise deducted: *Provided,* That in the case of such properties acquired prior to March 1, 1913, the fair market value of the property (or the taxpayer's interest therein)

on that date shall be taken in lieu of cost up to that date: *Provided further,* That in the case of mines, oil and gas wells, discovered by the taxpayer, on or after March 1, 1913, and not acquired as the result of purchase of a proven tract or lease, where the fair market value of the property is materially disproportionate to the cost, the depletion allowance shall be based upon the fair market value of the property at the date of the discovery, or within thirty days thereafter; such reasonable allowance in all the above cases to be made under rules and regulations to be prescribed by the Commissioner with the approval of the Secretary. In the case of leases the deductions allowed by this paragraph shall be equitably apportioned between the lessor and lessee.

Complying with the provisions of the statutes the following regulations were made:

Article 210 of Regulations 45 (1920 ed.) provides in part as follows:

(b) When the value of the property at the basic date has been determined, depletion for the taxable year shall be determined by dividing the value remaining for depletion by the number of units of mineral to which this value is applicable, and by multiplying the unit value for depletion, so determined, by the number of units sold within the taxable year. In the selection of a unit for depletion preference shall be given to the principal or customary unit or units paid for in the product sold.

Article 172 of Regulations 33 (Revised) provides in part as follows:

> PAR. 532. The *en bloc* value having been thus ascertained, an estimate of the number of units (tons, pounds, etc.) should be made. The *en bloc* value divided by the estimated number of units in the property will determine the per unit value, or amount of capital applicable to each unit, which, multiplied by the number of units mined and sold during any one year, will determine the sum which will constitute an allowable deduction from the gross income of that year on account of depletion.

STATEMENT

The taxpayer is the owner of an undivided one-sixth interest in certain lands underlaid with iron ore, which prior to March 1, 1913, she and her co-owners had leased to various lessees for the purpose of extracting or mining, taking out, and removing and shipping therefrom the merchantable ore upon a royalty at the rate of twenty-five cents per ton. (R. 90, 106, 116, 127, 138, 149, 160.) During the year 1917 the taxpayer received in royalties the sum of $260,072.30. (R. 29.) In her income-tax return for that year she reported the amount so received as income and deducted as a reasonable allowance for depletion the same amount (Plaintiff's Exhibit A, R. 61), thus reporting as taxable income from rents and royalties "none." During the year 1918 she received royalties in the sum of $219,940.43. (R. 29.) In her income-tax return for that year she

reported the amount so received as income and deducted as a reasonable allowance for depletion the same amount (Plaintiff's Exhibit B, R. 77), thus reporting as taxable income from rents and royalties "none." Upon the filing of these returns the Commissioner notified the taxpayer (R. 176):

> Your method of deducting from gross income the entire amount received as royalty from iron mines as depletion is not approved by this office. The correct amount to be deducted for depletion, based upon the unit cost per ton of mineral reserves, as of March 1, 1913, as determined by the Valuation Engineers of this Department is shown as follows: * * *
>
> For 1917 ..... $92,194.92 (R. 176),
> and for 1918 ..... 77,968.20 (R. 195) * * *.

Later, upon reconsideration, the Commissioner increased the depletion for 1917 to $99,561.20 (R. 192), for 1918 to $84,979.55 (R. 198).

The taxpayer paid under protest the additional tax assessed by reason of the changes made in the depletion allowances and filed claims for refund. Her claim for the year 1917 alleges that the additional tax is erroneous because—

> Tax as assessed is based upon income received from royalties from iron ore mines. Depletion amounting to $99,561.20 was allowed to taxpayer, whereas depletion amounting to $203,510.86 should be allowed. The latter amount is the present worth of the ore mined in 1917, as of March 1, 1913,

and is arrived at by discounting the amount received in 1917 at 5% to March 1, 1913. (R. 201.)

The claim for 1918 was predicated upon the same alleged error. (R. 204.) Both of these claims were rejected (R. 206, 207), whereupon the taxpayer brought this action in the United States District Court for the Northern District of Illinois.

The Government contended in the courts below (R. 23, 214) that the proper allowance for depletion in each year in respect to each mine must, in accordance with the regulations, be determined by multiplying the March 1, 1913, value of the taxpayer's interest in that mine by the percentage of the whole reserve which was withdrawn and paid for during the year for which the allowance is being computed, and that, therefore, the proper allowance could not be computed unless the March 1, 1913, value of the taxpayer's interest in the mine and the reserve tonnage were shown; that the taxpayer having failed to show these factors could not recover.

The taxpayer contended and the Circuit Court of Appeals held (R. 223) that the proper allowance for depletion was determined, not by the March 1, 1913, value of the taxpayer's interest and the relation between the reserves and the amount withdrawn, but by "the market value in the mine of the product mined and sold during the year for which the return is made"; that the Commissioner's val-

uation was erroneous in that it did not establish this market value; and that, since the plaintiff had established this market value she was entitled to the deduction claimed by her.

SPECIFICATION OF ERROR TO BE URGED

The Circuit Court of Appeals erred in holding that the taxpayer was entitled under Section 214 (a) (10) of the Revenue Act of 1918 and under Section 5 (a) Eighth of the Revenue Act of 1916 to compute the reasonable allowance for depletion upon the basis of the fair cash market value in the mine of the tonnage mined during the taxable year, and to deduct this value less the "interest-carrying charge," said to be five per cent per annum from March 1, 1913, to 1916. (R. 226.) This is erroneous because the amount so allowed is a greater part of the taxpayer's capital investment than the tonnage paid for is of the whole reserve. The proper allowance should be computed by determining the percentage of the whole reserve which was withdrawn and paid for during the taxable year and taking this same percentage of the plaintiff's capital investment, that is, of the March 1, 1913, value of the plaintiff's interest in the mine. In other words, the depletion in dollars is the same percentage of the capital investment as the depletion in tons is of the whole reserve, whereas the Circuit Court of Appeals has allowed depletion in dollars at a rate which is not the same as the rate of the actual depletion in tons.

REASONS FOR GRANTING THE WRIT

The Circuit Court of Appeals in affirming the judgment of the District Court and in allowing the respondent to take the deductions claimed by her has laid down a rule which is in conflict with the rule established by the Circuit Court of Appeals for the Third Circuit in the case of *New Creek Company* v. *Lederer,* 295 Fed. 433, certiorari denied, 265 U. S. 581, and with the principle announced by this Court in the case of *United States* v. *Ludey,* 274 U. S. 295.

The rule announced by the Circuit Court of Appeals disregards the regulations duly promulgated and which, as is not the case in respect to all regulations, Congress specifically said should govern the method of arriving at a reasonable allowance for depletion.

These regulations have been consistently followed since 1916, not only under the Acts involved in the case at bar but also under all subsequent Acts. They have been almost unanimously accepted by taxpayers as correct.

The rule enables taxpayers to recover in money a large part of the capital before the exhaustion of the ore in which that capital is still invested.

The question is one of general importance. Depletion allowances have been computed by the Bureau in the manner rejected by the Circuit Court of Appeals in this case with absolute consistency since 1916. Any change in the rule at this time

would not only necessitate a recomputation and revision by the Bureau of all returns as to which refunds are not barred, but would also deprive taxpayers who have previously complied with the regulations of the right intended to be given them by statute of recovering their capital investments in full.

Wherefore, it is respectfully submitted that this petition for certiorari to review the judgment of the Circuit Court of Appeals for the Seventh Circuit should be granted.

WILLIAM D. MITCHELL,
Attorney General.
ALFRED A. WHEAT,
Special Assistant to the Attorney General.
MARCH, 1929.

BRIEF IN SUPPORT OF PETITION

OPINIONS BELOW

The District Court did not write an opinion. Its reasons for directing a verdict in favor of the plaintiff are set out on page 56 of the Record. The opinion of the Circuit Court of Appeals (R. 223) has not yet been officially reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on January 2, 1929. (R. 222.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

STATEMENT

A statement of the facts and of the errors relied upon will be found in the petition.

ARGUMENT

The amount to be allowed, if any, on account of the depletion of mines, is discretionary with Congress.

> *Lynch* v. *Alworth-Stephens Company,* 267 U. S. 364; *Stratton's Independence* v. *Howbert,* 231 U. S. 399; *Von Baumbach* v. *Sargent Land Company,* 242 U. S. 503; *Goldfield Consolidated Mines Company* v. *Scott,* 247 U. S. 126; *United States* v. *Biwabik Mining Company,* 247 U. S. 116; *Stanton* v. *Baltic Mining Company,* 240 U. S. 103.

The Revenue Act of 1918 expressly provides that the allowance for depletion shall be "based upon cost including cost of development not otherwise deducted: *Provided,* That in the case of such properties acquired prior to March 1, 1913, the fair market value of the property (or the taxpayer's interest therein) on that date shall be taken in lieu of cost up to that date." This Court in the case of *United States* v. *Ludey,* 274 U. S. 295, construing the provisions of the Revenue Act of 1916 held that under that Act also it was intended that the depletion allowance should be based upon the March 1, 1913, value of the plaintiff's interest in the mining property. The Circuit Court of Appeals does not base the allowance for either year upon the March 1, 1913, value of the respondent's interest in the mines, but upon the market value of

the ore mined and sold during the year. The result of calculating the allowance upon the basis adopted by the Circuit Court of Appeals is to defeat the intention of the statute which, as this Court said in the *Ludey Case, supra,* was to deduct the estimated cost of the part of the reserve used up in computing the net income for the year in which the reserve was used up.

The deduction permitted by the Circuit Court of Appeals nullifies the Commissioner's regulations, subdivision (b) of Article 210, Regulations 45; Paragraph 532, Article 172, Regulations 33, which regulations were approved by the Circuit Court of Appeals for the Third Circuit in the case of *New Creek Company* v. *Lederer,* 295 Fed. 433, and by this Court in the *Ludey Case, supra.* Cf. *Appeal of Kehota Mining Company,* 3 B. T. A. 885; *Kehota Mining Company* v. *Lewellyn,* 28 F. (2d) 995, affirmed by the Circuit Court of Appeals for the Third Circuit, not yet officially reported. These regulations are not mere interpretations by the Commissioner of the law. Congress has expressly delegated to the Commissioner the power to prescribe by regulations the method of ascertaining a reasonable allowance. The regulations made in pursuance of this authority are as binding upon the courts as if incorporated into the law by Congress itself.

Boske v. *Comingore,* 177 U. S. 459; *United States* v. *Birdsall,* 233 U. S. 223; *United States* v. *Morehead,* 243 U. S. 607.

The regulations promulgated by the Commissioner are in accordance with the customary practice in the mining industry. (R. 48, et seq.) Their effect is to return the capital invested in step with the exhaustion of the physical property, so that at all times the capital of the taxpayer is intact. The allowance permitted by the Circuit Court of Appeals may result in the return of the taxpayer's entire capital prior to the exhaustion of the mine, or it may result in his never receiving tax free his whole capital investment, but it can not result in his receiving back the last of his capital coincident with the exhaustion of the last of the ore unless by an unusual coincidence the actual rate of extraction should be the same as the extraction estimated for the fixing of the capital value, and in no event can it result in a return of capital in step with actual exhaustion.

In the case of *United States* v. *Ludey, supra,* this Court said (p. 302):

> The depletion charge permitted as a deduction from the gross income in determining the taxable income of mines for any year represents the reduction in the mineral contents of the reserves from which the product is taken. The reserves are recognized as wasting assets. The depletion effected by operation is likened to the using up of raw material in making the product of a manufacturing establishment. As the cost of the raw material must be deducted from the gross income before the net income can

> be determined, so the estimated cost of the part of the reserve used up is allowed. The fact that the reserve is hidden from sight presents difficulties in making an estimate of the amount of the deposits. The actual quantity can rarely be measured. It must be approximated. And because the quantity originally in the reserve is not actually known, the percentage of the whole withdrawn in any year, and hence the appropriate depletion charge, is necessarily a rough estimate. But Congress concluded, in the light of experience, that it was better to act upon a rough estimate than to ignore the fact of depletion.

The Government construes this opinion to mean just what it says, namely, that each ton of ore in the mine represents a proportionate part of the taxpayer's capital investment, and that, accordingly, the extraction of one ton of ore "depletes" the taxpayer's capital in the same proportion as it "depletes" the mineral content.

In the case of interests acquired prior to March 1, 1913, the fair market value as of that date of the taxpayer's interest is the taxpayer's capital investment. The witnesses introduced by the respondent on the question of value in this case expressly disclaimed any knowledge of or intention to testify as to this value. (R. 33, 35, 37.) With deference to the statement of the Circuit Court of Appeals that the only question involved in this case is the "method of arriving at the value of the iron ore

in the ground on March 1, 1913" (R. 223), there are many other factors entering into the valuation of the taxpayer's interest in the mines as of March 1, 1913. The determination of this value is a question of fact, and to quote John A. Savage, one of the respondent's witnesses, "It would require a good deal of calculation and certain assumptions as to how fast that ore would be shipped. Then it would require discounting against those assumptions to present value." (R. 33.) If, as the Circuit Court of Appeals seems to hold, the method used by the Commissioner in determining the value as of March 1, 1913, is wrong, this record certainly does not show what is right. The taxpayer in this case has not shown, has not attempted to show, and indeed does not contend, that the amounts acutally allowed by the Commissioner are not the same percentage of the taxpayer's capital investment as the tonnage paid for is of the whole reserve. She complains, and has shown, that she has not been allowed an amount greater than this percentage. She claimed, and has been allowed by the courts, an amount based solely upon the market value of the ore in place regardless of the March 1, 1913, value of her interests in the mines or in each ton of ore, and regardless of the relation between the amount allowed and the capital investment. This value in place is not shown and indeed could not be shown to have the same relation to the capital investment as the tonnage withdrawn has to the total reserve. The

taxpayer has, therefore, not shown in this case either that the amount actually allowed by the Commissioner was erroneous or that the amount she claims is correct. The Circuit Court of Appeals was, therefore, in error in sustaining the action of the lower court in directing a verdict for the respondent and in refusing to direct a verdict for the petitioner.

CONCLUSION

Because of the far-reaching effect of the opinion below and its wide departure from the theory of depletion adopted by the regulations, and sanctioned by this Court, and by the Circuit Court of Appeals for the Third Circuit, and because of the manifest importance of an authoritative determination of the basis upon which depletion allowances must be calculated, it is respectfully submitted that the petition for certiorari in this case should be granted.

WILLIAM D. MITCHELL,
Attorney General.

ALFRED A. WHEAT,
Special Assistant to the Attorney General.

C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue,

T. H. LEWIS, Jr.,
Special Attorney,
Bureau of Internal Revenue,
Of Counsel.

MARCH, 1929.

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No. 59

In the Supreme Court of the United States

OCTOBER TERM, 1929

MABEL G. REINECKE, COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF ILLINOIS, PETITIONER

v.

EUDORA HULL SPALDING

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE PETITIONER

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In the Supreme Court of the United States

OCTOBER TERM, 1929

No. 59

MABEL G. REINECKE, COLLECTOR OF INTERNAL REVENUE for the First District of Illinois, petitioner

v.

EUDORA HULL SPALDING

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The District Court did not write an opinion. Its reasons for directing a verdict in favor of the respondent appear on page 44 of the Record. The opinion of the Circuit Court of Appeals (R. 159) is reported in 30 F. (2d) 369.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on January 2, 1929. (R. 159.) Petition for certiorari was filed March 30, 1929. Certiorari was granted April 29, 1929. (R. 165.)

The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The question in this case is whether in computing income taxes for 1917 and 1918 a taxpayer who received royalties under leases of mining lands made prior to March 1, 1913, may compute an allowance for the depletion of her interests in mines on the basis of the March 1, 1913, value in the ground of the specific ore extracted during the years for which the computation is made, wholly disregarding the March 1, 1913, value of the taxpayer's interests in the mines and the relation between that value and the total reserves.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are included in an appendix to this brief, pp. 24–34, *infra*.

STATEMENT

The taxpayer is the owner of an undivided one-sixth interest in certain lands underlaid with iron ore, which prior to March 1, 1913, she and her co-owners had leased to various lessees for the purpose of extracting or mining, taking out, and removing and shipping therefrom the merchantable ore upon royalties at the rate of twenty-five cents per ton. (R. 63, 75, 83, 92, 100, 108, 116.) Under these leases the taxpayer received as royalties the sum of $260,072.30 during the year 1917, and the sum of

$219,940.43 during the year 1918. (R. 22.) In her income-tax return for those years she reported the amounts so received as income and deducted as reasonable allowances for depletion the same amounts, thus reporting as taxable income from rents and royalties "none." (Plaintiff's Exhibits A and B, R. 46, 54.) Upon the filing of these returns the Commissioner notified the taxpayer (R. 128):

> Your method of deducting from gross income the entire amount received as royalty from iron mines as depletion is not approved by this office. The correct amount to be deducted for depletion, based upon the unit cost per ton of mineral reserves, as of March 1, 1913, as determined by the Valuation Engineers of this Department is shown as follows: * * *
>
> For 1917 ..... $92,194.92 (R. 128)
> and for 1918 ..... 77,968.20 (R. 141)

Later, upon reconsideration, the Commissioner increased the depletion for 1917 to $99,561.20 (R. 139), and for 1918 to $84,979.55 (R. 143).

The taxpayer paid under protest the additional taxes assessed by reason of the changes made in the depletion allowances and filed claims for refund. Her claim for the year 1917 alleges that the additional tax is erroneous because (R. 145)—

> Tax as assessed is based upon income received from royalties from iron ore mines. Depletion amounting to $99,561.20 was allowed to taxpayer, whereas depletion amounting to $203,510.86 should be allowed.

> The latter amount is the present worth of the ore mined in 1917, as of March 1, 1913, and is arrived at by discounting the amount received in 1917 at 5% to March 1, 1913.

The claim for 1918 was predicated upon the same alleged error. (R. 148.) Both of these claims were rejected (R. 149, 150), whereupon the taxpayer brought this action in the United States District Court for the Northern District of Illinois.

The record does not clearly show the method used by the Commissioner in computing the allowances, but the taxpayer's method does clearly appear.

The Government contended in the courts below that the method used by the taxpayer is improper and that the proper allowance for depletion in each year in respect to each mine must, in accordance with the statutes and regulations, be determined by taking as a basis the March 1, 1913, value of the taxpayer's interest in that mine. The Government further contended that this value should be multiplied by the percentage of the whole reserve which was withdrawn and paid for during the year for which the allowance is computed, and that therefore the proper allowance could not be computed unless the March 1, 1913, value of the taxpayer's interest in the mines and the reserve tonnage were shown, and, that as the taxpayer failed to show these factors, she could not recover. (R. 17, 154.)

The case was tried in the District Court before a jury. At the close of the evidence the Government

moved for a directed verdict (R. 17) on the ground there was not sufficient evidence to entitle the taxpayer to recover and that the verdict must be for the Government because—

1. There is no legally sufficient evidence to show the fair market value as of March 1, 1913, of the plaintiff's interest in each of the mines involved in this action.

2. There is no legally sufficient evidence to show the tonnage known or estimated remaining in the respective mines as of December 31, 1916, December 31, 1917, December 31, 1918, and December 31, 1919, respectively.

3. The undisputed evidence shows that the method for calculating depletion allowance used by the plaintiff does not result in reasonable allowance.

4. The undisputed evidence shows that the method of calculating depletion allowance used by the plaintiff is not in compliance with the regulations of the Commission of Internal Revenue duly promulgated.

5. The undisputed evidence shows that the allowances computed by the plaintiff are not a percentage of his capital invested equal to the percentage of the whole mineral content withdrawn during the year, and are not a percentage of his capital investment equal to the percentage of the unpaid royalties paid during the year for which the calculation is made.

The taxpayer also moved for a directed verdict. (R. 18.) The court granted the taxpayer's motion and denied the Government's motion. (R. 44.) To these rulings exceptions were duly taken and an appeal to the Circuit Court of Appeals for the Seventh Circuit was prosecuted. The errors assigned in that court are found on pages 154–155 of the Record.

That court affirmed the judgment of the District Court. (R. 163.) It held that the proper allowance for depletion was the market value on March 1, 1913, of the tonnage in the mine of the product mined during the year for which the return is made, "less the interest carrying charge of 5%" and that since the plaintiff had established that market value and this charge, she was entitled to the deduction claimed by her in her amended declaration. (R. 163.) The opinion says (R. 160):

> The sole controversy is over the correctness of the Government's method of arriving at the value of the iron ore in the ground on March 1, 1913, a matter not covered by the revenue acts in question, nor by any regulation of the Treasury Department.

We contend that these premises are incorrect. The opinion of the court also makes certain statements as to the Government's methods which, we submit, are not supported either by the record or by the facts. (See pp. 34–38, *infra*.)

SPECIFICATION OF ERROR TO BE URGED

The Circuit Court of Appeals erred in holding that the taxpayer was entitled under Section 214 (a) (10) of the Revenue Act of 1918 and under Section 5 (a) Eighth of the Revenue Act of 1916 to compute the reasonable allowance for depletion upon the basis of the fair cash market value in the mine of the tonnage mined during the taxable year, and to deduct this value less the "interest carrying charge," said to be five per cent per annum from March 1, 1913. (R. 163.)

SUMMARY OF ARGUMENT

1. The taxpayer had the burden of establishing the facts showing that she was entitled to the allowance for depletion which the Commissioner had disallowed.

2. The taxpayer failed to establish the value of her interest in the mines as of March 1, 1913. Although several witnesses testified that the value of the ore in place in the mines was 25 cents per ton on March 1, 1913, every one of these witnesses admitted that the question as to the value of the taxpayer's interest in the ore was an entirely different matter and no witness testified as to this matter. Nevertheless, the court below proceeded upon the theory that her interest on March 1, 1913, in the ore was valued at the rate of 25 cents per ton.

3. The only proper basis for computing the allowance for depletion was the value of the taxpayer's interest in the mines on March 1, 1913.

The taxpayer's only interest in the properties on March 1, 1913, was that of lessor. The Revenue Acts of 1917 and 1918 and the regulations made in pursuance of the authority granted by them provide in effect that the basis for computing the allowance for depletion in the case of a lessor of mining properties is the value as of March 1, 1913, of the royalties to be expected under the terms of the lease in effect on that date, and that the allowance must represent the reduction of capital assets of the taxpayer during the year. The regulations are based upon correct principles and have the force and effect of law.

4. The allowance for depletion should be computed by determining the percentage of the whole reserve which was withdrawn and paid for during the taxable year and taking this same percentage of the value of the taxpayer's interest in the mine on March 1, 1913. This is required by correct principles of depletion and the specific provisions of the regulations. It is also in accordance with the customary practice in the mining industry, according to the uncontradicted testimony in this case. The courts below, however, followed a method which was not based upon the March 1, 1913, value of the taxpayer's interest in the property and a method which results in a depletion allowance having no necessary relation to that percentage.

ARGUMENT

I

THE TAXPAYER HAD THE BURDEN OF ESTABLISHING THE FACTS SHOWING THAT SHE WAS ENTITLED TO THE ALLOWANCE FOR DEPLETION WHICH THE COMMISSIONER HAD DISALLOWED

This burden rests upon the taxpayer in an action brought by him to recover taxes alleged to have been illegally collected. In *Botany Mills* v. *United States,* 278 U. S. 282, such an action was brought by a taxpayer which was a corporation. It contended that in the computation of its income taxes it was entitled to a large deduction on account of certain payments made to its directors, on the ground that these payments constituted a part of its "ordinary and necessary expenses" in the maintenance and operation of its business and property. This Court said (pp. 289–290):

> And in this suit the burden of establishing that fact rested upon it, in order to show that it was entitled to the deduction which the Commissioner had disallowed, and that the additional tax was to that extent illegally assessed.

See also, to the same effect, *United States* v. *Anderson,* 269 U. S. 422, 443.

II

THE TAXPAYER FAILED TO ESTABLISH THE VALUE OF HER INTEREST IN THE MINES AS OF MARCH 1, 1913

If, as we contend, the only proper basis for computing the allowance for depletion was the value

of the *taxpayer's interest* in the mines as of March 1, 1913, the plaintiff must be denied recovery, as she failed to show that value. Although she put on the stand various witnesses who testified that the March 1, 1913, *value of the ore* in place in the mines was twenty-five cents a ton, every one of these witnesses admitted that the question as to the value of the *taxpayer's interest* in each ton of ore was an entirely different matter, and no witness testified as to this matter. Thus the following appears in the testimony of Savage (R. 24):

> Q. You do not mean by that that Mrs. Spalding's interest in that ton of ore was worth at least 25 cents, do you?
>
> * * * * *
>
> A. That question is based upon Mrs. Spalding's one-sixth ownership of a lease at 25 cents per ton. That question is an entirely different one from the one asked me by Mr. Zane. It would require a good deal of calculation and certain assumptions as to how fast that ore would be shipped. Then it would require discounting against those assumptions to present value. That calculation would take time, and I can not answer that without working it out.

And the witness Keith testified (R. 26):

> Mrs. Spalding's interest in a ton of ore was not necessarily as of March 1, 1913, of the fair market value of over 25c. a ton. In testifying as to the value of a ton of ore I was not speaking of Mrs. Spalding's inter-

> est, or of any one's interest. I was speaking of the value of a ton of ore regardless of ownership. I do not know of my own knowledge what Mrs. Spalding's interest *of* a ton of ore was as of March 1, 1913.

Ives, the third and last witness on the question of value, testified (R. 28):

> I do not know what the value of Mrs. Spalding's interest in any ton of ore would be.

The Circuit Court of Appeals proceeded upon the theory that the taxpayer's interest on March 1, 1913, in the ore was valued at the rate of 25 cents per ton. With respect to this the court said (R. 163):

> It seems clear that the ore mined in 1916 [1917] was worth to plaintiff 25 cents per ton, that that price continued [contained] two elements, mine depletion and profit, and that the way of arriving at the profit was to take the fair cash market value on March 1, 1913, of the tonnage mined in 1916 [1917] (which was shown to be 25 cents per ton) less the interest carrying charge of 5% from March 1, 1913, to 1916 [1917].

This conclusion was based upon the evidence that the ore at all times on and after March 1, 1913, had a market value in the ground untouched and unextracted above 25 cents per ton. (R. 23, 25, 26, 27.) This testimony, however, had no relation to the taxpayer's interest or to any distinct interest.

III

THE ONLY PROPER BASIS FOR COMPUTING THE ALLOWANCE FOR DEPLETION WAS THE VALUE OF THE TAXPAYER'S INTEREST IN THE MINES AS OF MARCH 1, 1913.

On March 1, 1913, the taxpayer did not have the right to extract any ore from any of the mines. Her interest in the properties was merely that of lessor; her rights were merely to receive the royalties stipulated in the leases and to obtain possession of the property on the termination of the leases.

The Revenue Act of 1916 (pp. 24–25, *infra*) allowed a taxpayer deriving income from mines—

> a reasonable allowance for depletion thereof not to exceed the market value in the mine of the product thereof, which has been mined and sold during the year for which the return and computation are made, such reasonable allowance to be made * * * under rules and regulations to be prescribed by the Secretary of the Treasury: *Provided,* That when the allowances authorized * * * shall equal the capital originally invested, or in case of purchase prior to March first, nineteen hundred and thirteen, the fair market value as of that date, no further allowance shall be made.

The Revenue Act of 1918 (pp. 25–26, *infra*) allowed such a taxpayer—

> a reasonable allowance for depletion * * * according to the peculiar conditions in each case, based upon cost including cost of devel-

> opment not otherwise deducted: *Provided,* That in the case of such properties acquired prior to March 1, 1913, the fair market value of the property (or the taxpayer's interest therein) on that date shall be taken in lieu of cost up to that date: * * * such reasonable allowance in all the above cases to be made under rules and regulations to be prescribed by the Commissioner with the approval of the Secretary. In the case of leases the deductions allowed by this paragraph shall be equitably apportioned between the lessor and lessee.

There is nothing in either of these statutes indicating that a lessor of mines could base an allowance for depletion on anything except his own interest in the property (as distinguished from all of the interests in the property). The 1918 Act prescribes as the basis for computing the allowance *the taxpayer's interest* in the property, and we submit that it is not reasonable to construe the 1916 Act in any other way.

The method of computing the allowance adopted by the taxpayer in the instant case finds no support in the regulations governing the collection of the tax for 1917 (pp. 32–34, *infra*), but these indicate that the basis for allowance is the capital interest of the taxpayer in the property on March 1, 1913. The regulations under the 1918 Act (pp. 26–32, *infra*) contemplate that the basis for computing the allowance in the case of a lessor is "the *value of his*

equity in the property at the basic date," and provide that—

> The value of a lessor's equity in a mineral property under lease March 1, 1913, for the entire operating life of the mineral deposits is the value as of March 1, 1913, of the royalties and other payments to be expected under the terms of the lease in effect on that date.

Obviously the value of such an equity would not be the aggregate sum of all of the royalties to be collected over a long term of years, but would be the market value on March 1, 1913, of the lessor's right to the royalties. Article 206 of the regulations under the 1918 Act provides (p. 28, *infra*) that the value which is the basis for depreciation must be determined—

> in the light of the conditions and circumstances known at that date [March 1, 1913] * * *. The value sought should be that established assuming a transfer between a willing seller and a willing buyer as of that particular date.

That this method of determining value is a correct one is demonstrated by the opinion of this Court in *Ithaca Trust Co.* v. *United States,* 279 U. S. 151, 155.

Although the provisions of, and the regulations under, the earlier Act are not as specific as the provisions of, and the regulations under, the Act of 1918, it seems clear that the depletion allowance under the earlier Act and regulations should be

based upon the March 1, 1913, value of the plaintiff's interests. See *United States* v. *Ludey*, 274 U. S. 295; *New Creek Co.* v. *Lederer*, 295 Fed. 433 (certiorari denied 265 U. S. 581). In *Lynch* v. *Alworth-Stephens Co.*, 267 U. S. 364, this Court held that a lessee of a mine was entitled to an allowance for depletion in its income tax for the year 1917, and said (pp. 369, 371):

> The interest of respondent under its leases in the mines being property, its right to deduct a reasonable allowance for exhaustion of such property, if there be any, during the taxable year results from the plain terms of the statute, such deduction, since the property is an interest in mines, to be limited to the amount of the exhaustion of *respondent's interest* caused by the depletion of the mines during the taxable year. * * * The deduction for depletion in the case of mines is a special application of the general rule of the statute allowing a deduction for exhaustion of property. While respondent does not own the ore deposits, its right to mine and remove the ore and reduce it to possession and ownership is property within the meaning of the general provision. Obviously, as the process goes on, this property interest of the lessee in the mines is lessened from year to year, as the owner's property interest in the same mines is likewise lessened. There is an exhaustion of property in the one case as in the other; and the extent of it, with the consequent de-

> duction to be made, in each case is to be arrived at in the same way, namely, by determining the aggregate amount of the depletion of the mines in which the several interests inhere, based upon the market value of the product, *and allocating that amount in proportion to the interest of each severally considered.* (Italics ours.)

The allowance must represent the reduction of capital assets of the taxpayer during the year. See regulations, Articles 201, 172, pp. 26–27, 32, *infra*. This, we submit, is the principle underlying the decision in *United States* v. *Ludey, supra,* in which the Court said (274 U. S. at p. 302):

> The depletion charge permitted as a deduction from the gross income in determining the taxable income of mines for any year represents the reduction in the mineral contents of the reserves from which the product is taken. The reserves are recognized as wasting assets. The depletion effected by operation is likened to the using up of raw material in making the product of a manufacturing establishment. As the cost of the raw material must be deducted from the gross income before the net income can be determined, so the estimated cost of the part of the reserve used up is allowed. The fact that the reserve is hidden from sight presents difficulties in making an estimate of the amount of the deposits. The actual quantity can rarely be measured. It must be approximated. And because the quantity originally in the reserve is not actually

known, the percentage of the whole withdrawn in any year, and hence the appropriate depletion charge, is necessarily a rough estimate. But Congress concluded, in the light of experience, that it was better to act upon a rough estimate than to ignore the fact of depletion.

See also *Weiss* v. *Weiner*, 279 U. S. 333.

The *Ludey case* and the *New Creek Co. case, supra*, also show that the regulations in question are based upon correct principles. These regulations were promulgated, not as an interpretation of the law, but as a complement to it under express authority granted by the Revenue Acts, and hence have the force and effect of law. Regulations so adopted should not be disregarded or departed from unless plainly inconsistent with law. *Boske* v. *Comingore*, 177 U. S. 459; *United States* v. *Birdsall*, 233 U. S. 223; *United States* v. *Morehead*, 243 U. S. 607.

It is well established that only such deductions for depletion as are authorized by statute may be permitted. *Stanton* v. *Baltic Mining Co.*, 240 U. S. 103.

IV

THE ALLOWANCE FOR DEPLETION SHOULD BE COMPUTED BY DETERMINING THE PERCENTAGE OF THE WHOLE RESERVE WHICH WAS WITHDRAWN AND PAID FOR DURING THE TAXABLE YEAR AND TAKING THIS SAME PERCENTAGE OF THE VALUE OF THE TAXPAYER'S INTEREST IN THE MINE ON MARCH 1, 1913

Much of the criticism directed by the Circuit Court of Appeals at the Commissioner's determina-

tion was based upon an erroneous conception of what was actually done. See pp. 34–38, *infra*.

At the trial the Government took the position that the method used by the Commissioner was immaterial (R. 30) and the record does not show exactly how the computation was made. The District Court said that it was conceded at the argument that the record in the case "is for all purposes of this motion, the same record, or, rather, substantially the same record as the record" in *McHale* v. *Hull*. (R. 44.) The Circuit Court of Appeals stated that "The leases, for iron ore bearing lands, in this case, were involved in *McHale* v. *Hull*, 16 Fed. (2d) 781, and were made by appellee in that case and by plaintiff (appellee) here, and others, as lessors." (R. 159.)

Extracts from the agreed statement of facts in *McHale* v. *Hull*, showing how the depletion allowances were computed, appear in Appendix C at the end of this brief.

If, as we have contended above, the burden was upon the taxpayer to show that she was entitled to the allowance for depletion which the Commissioner had disallowed, the position taken by the Government in the court below was correct, and for purposes of the decision of the instant case it would seem unnecessary to discuss the correct theory. Nevertheless, it appears to us pertinent to point out the correct method and to demonstrate that the principles adopted by the court below were at variance with this method.

The deductions allowed on account of the depletion of mines are intended to return to the taxpayer his capital invested in the mines. *United States* v. *Ludey*, 274 U. S. 295, *supra*; *Weiss* v. *Weiner*, 279 U. S. 333, *supra*. As this Court said in *Stratton's Independence* v. *Howbert*, 231 U. S. 399, 421, the amount of depreciation is to be "determined not upon the basis of latent and occult intrinsic values, but upon considerations that affect market value and have their influence upon men of affairs charged with the management of the business and accounting of corporations that are organized for profit and are engaged in business for purposes of profit."

The capital investment should be returned in step with the exhaustion of the physical property, that is to say, the depletion allowed with respect to each ton of ore mined and sold should be the same proportion of the capital invested as that ton is of the total reserves in which that capital is invested. See *United States* v. *Ludey*, 274 U. S. 295 (pp. 16–17, *supra*).

In order to apply the principles just stated, it is necessary to obtain the value on March 1, 1913, of the taxpayer's expected royalties. To value these, resort should be had to a discount factor in accordance with the sinking fund method for valuing equal amounts of annual income. If the reversion is valuable, the value of this should be included, but if it is contemplated that the whole value of the land will be exhausted during the leases, nothing need be

added for this interest. When the entire value of the taxpayer's interest has been ascertained, the value of the taxpayer's interest in a single unit comprised within the ore deposit should be determined in accordance with the regulations by dividing the value of the whole by the number of units. The quotient thus obtained represents the amount of capital applicable to each unit. When multiplied by the number of units extracted in any one year, the product will be the amount which will constitute an allowable deduction from the gross income of that year on account of depletion. Article 210, p. 32, *infra;* Article 172, p. 33, *infra.*

The method thus provides for the return of the capital investment in step with the exhaustion of the ore bodies. The calculation results in a depletion figure which, when deducted from the total royalties received during the year, shows the amount of taxable profit over the original capital.

The taxpayer in this case did not show, and does not seem to contend, that the Commissioner did not compute the depletion according to this method.

There was uncontradicted testimony of a qualified consulting mining engineer that in figuring depletion in the mining industry, it is the custom to take the value of the owner's interest in the mine on the basic date, to divide that value by the tonnage to get a factor to be used for depletion, and to figure the depletion for any year by multiplying that factor by the number of tons extracted in that year; and that without the value of the owner's interest on

the basic date and an estimate of the ore reserve it is impossible to determine a proper allowance for depletion. (R. 40–41.) The same witness also testified, without contradiction, that the unit of depletion depends upon the proportion of the total reserve in the mine which is extracted during the year. (R. 41–42.) All of this testimony the courts below disregarded.

The Circuit Court of Appeals assumed that respondent owned the ore in place on March 1, 1913, and held that its intrinsic value, determined by reference to events occurring thereafter and consequently unknown on March 1, 1913, was her capital and that she is entitled to deduct that value as the measure of depletion This method entirely disregards the extent of the mineral reserve on March 1, 1913, and gives no weight to the portion of the reserve which was exhausted in each taxable year. It permits an allowance which may result in the return of the taxpayer's entire capital prior to the exhaustion of the mine, or it may result in her never receiving tax-free her whole capital investment. Only through a coincidence can it result in her receiving back the last of her capital simultaneously with the exhaustion of the last of the ore. This is so because this method depends wholly upon the element of time and attributes to a ton of ore mined in one year a greater capital value than it attributes to a ton mined in a subsequent year. This is erroneous because a ton mined in 1917 is the same proportion of the total tonnage in the mine on

March 1, 1913, as is another ton of ore mined in 1918.

Several mines were involved, and yet the Circuit Court of Appeals applied a common rate of depletion to each. In *United States* v. *Ludey*, 274 U. S. 295, *supra*, this Court indicated the necessity of a separate rate for each property. It was there said (p. 304):

> The deduction allowable in the several years for each of the properties is not found.

It can not be that each mine contained the same amount of mineral ore and that each mine suffered annual exhaustion in the same proportion. If these factors are to be disregarded, as the Circuit Court of Appeals indicated, then the term "depletion" becomes a misnomer.

If the taxpayer's interest in each ton of ore on March 1, 1913, was 25 cents, and if she received 25 cents for it in the taxable years, it is not clear upon what basis the Circuit Court of Appeals applied a 5% interest rate to determine the depletion. If she had a capital investment of 25 cents in each ton of ore she should logically demand a deduction in the same amount on account of depletion, thus disregarding any element of profit. Without some clear reason for applying a 5% interest rate, the method adopted in this case seems to require a depletion allowance similar to that which this Court has already characterized as quite inadmissable. *Stratton's Independence* v. *Howbert*, 231 U. S. 399, *supra*.

From the foregoing it appears that the Circuit Court of Appeals has approved a method of depletion which is not based upon the March 1, 1913, value of respondent's interest in the whole mineral reserve and a method which results in a depletion allowance having no necessary relation to the exhaustion of her interest. We submit that the statutes, regulations, and opinions of this Court require that these factors be taken into account.

Discussion of some subsidiary matters as to which we contend the court below was mistaken is inserted in Appendix B, pp. 34–38, *infra*.

CONCLUSION

For the reasons stated, we respectfully submit that the judgment of the court below should be reversed.

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NOVEMBER, 1929.

APPENDIX A

STATUTES AND REGULATIONS

As this action is brought to recover taxes for two years, the provisions of two Acts are involved. Taxes for the year 1917 are to be computed under the Revenue Act of 1917, c. 63, 40 Stat. 300, and the Revenue Act of 1916, c. 463, 39 Stat. 756, and specifically under Section 5 (a) thereof, which reads, so far as material, as follows (p. 759):

> Sec. 5. That in computing net income in the case of a citizen or resident of the United States—
>
> (a) For the purpose of the tax there shall be allowed as deductions—
>
> * * * * *
>
> Eighth. (a) In the case of oil and gas wells a reasonable allowance for actual reduction in flow and production to be ascertained not by the flush flow, but by the settled production or regular flow; (b) in the case of mines a reasonable allowance for depletion thereof not to exceed the market value in the mine of the product thereof, which has been mined and sold during the year for which the return and computation are made, such reasonable allowance to be made in the case of both (a) and (b) under rules and regulations to be prescribed by the Secretary of the Treasury: *Provided,* That when the allow-

ances authorized in (a) and (b) shall equal the capital originally invested, or in case of purchase made prior to March first, nineteen hundred and thirteen, the fair market value as of that date, no further allowance shall be made. No deduction shall be allowed for any amount paid out for new buildings, permanent improvements, or betterments, made to increase the value of any property or estate, and no deduction shall be made for any amount of expense of restoring property or making good the exhaustion thereof for which an allowance is or has been made.

Taxes for the year 1918 are controlled by the Revenue Act of 1918 (c. 18, 40 Stat. 1057, 1066, 1067), which provides in part as follows:

SEC. 214. (a) That in computing net income there shall be allowed as deductions:

* * * * *

(10) In the case of mines, oil and gas wells, other natural deposits, and timber, a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions in each case, based upon cost including cost of development not otherwise deducted: *Provided,* That in the case of such properties acquired prior to March 1, 1913, the fair market value of the property (or the taxpayer's interest therein) on that date shall be taken in lieu of cost up to that date: *Provided further,* That in the case of mines, oil and gas wells, discovered by the taxpayer, on or after March 1,

1913, and not acquired as the result of purchase of a proven tract or lease, where the fair market value of the property is materially disproportionate to the cost, the depletion allowance shall be based upon the fair market value of the property at the date of the discovery, or within thirty days thereafter; such reasonable allowance in all the above cases to be made under rules and regulations to be prescribed by the Commissioner with the approval of the Secretary. In the case of leases the deductions allowed by this paragraph shall be equitably apportioned between the lessor and lessee.

Complying with the provisions of the statutes the following regulations were made:

Regulations 45 (1920 ed.) relating to the income tax under the Revenue Act of 1918.

ART. 201. *Depletion of mines, oil and gas wells; depreciation of improvements.*—Sections 214 (a) (10) and 234 (a) (9) provide that taxpayers shall be allowed as a deduction in computing net income in the case of natural deposits a reasonable allowance for depletion of mineral and for depreciation of improvements. The provisions of the statute and these articles do not apply to or affect the regulations covering invested capital, losses, accounting methods, etc.

The essence of these provisions of the statute is that the owner of mineral deposits, whether freehold or leasehold, shall within the limitations prescribed, secure through an

aggregate of annual depletion and depreciation deductions the return of either (a) his capital invested in the property, or (b) the value of his property on the basic date, plus subsequent allowable capital additions (see article 222), but not including land values for purposes other than the extraction of minerals.

Operating owners, lessors, and lessees, whether corporations or individuals, are entitled to deduct an allowance for depletion and depreciation * * *.

ART. 204. *Capital recoverable through depletion in case of lessor.*—(a) In the case of a lessor, the capital remaining in any year recoverable through depletion and depreciation deductions is (1) the value of his equity in the property at the basic date minus (2) depletion and depreciation sustained, whether legally allowable or not, from the basic date to the taxable year, plus (3) subsequent allowable capital additions, and minus (4) the value of the land at the basic date for other purposes than mineral production. The capital recoverable through depletion is the total capital remaining less the sum recoverable through depreciation.

(b) The value of the equities of lessor and lessee shall be computed separately, but, when determined as of the same basic date, shall together never exceed the value at that date of the property in fee simple.

* * * * *

(d) The value of a lessor's equity in a mineral property under lease March 1, 1913, for the entire operating life of the mineral

deposits is the value as of March 1, 1913, of the royalties and other payments to be expected under the terms of the lease in effect on that date.

(e) The value of a lessor's equity in a mineral property under lease for a portion of its operating life is the value as of March 1, 1913, of the royalties expected from the mineral to be extracted during the life of the existing lease plus the estimated en bloc value of the mineral remaining at its expiration, which, in the absence of satisfactory evidence to the contrary, will be presumed not to exceed the value as of March 1, 1913, of royalties which could have been expected as at that date from the remaining mineral.

ART. 206. *Determination of fair market value of mineral property.*—(a) Where the fair market value of the property at a specified date in lieu of the cost thereof is the basis for depletion and depreciation deductions, such value must be determined, subject to approval or revision by the Commissioner, by the owner of the property in the light of the conditions and circumstances known at that date, regardless of later discoveries or developments in the property or subsequent improvements in methods of extraction and treatment of the mineral product. The value sought should be that established assuming a transfer between a willing seller and a willing buyer as of that particular date. The Commissioner will lend due weight and consideration to any and all factors and evidence having a bearing on the

market value, such as cost, actual sales and transfers of similar properties, market value of stock or shares, royalties and rentals, value fixed by the owner for purpose of the capital-stock tax, valuation for local or State taxation, partnership accountings, records of litigation in which the value of the property was in question, the amount at which the property may have been inventoried in probate court, disinterested appraisals by approved methods such as the present value method and other factors.

(b) To determine the fair market value of a mineral property by the present value method, the essential factors must be determined for each deposit included in the property. The factors are (1) the total quantity of mineral in terms of the principal or customary unit (or units) paid for in the product marketed, (2) the average quality or grade of the mineral reserves, (3) the expected percentage of extraction or recovery in each process or operation necessary for the preparation of the crude mineral for market, (4) the probable operating life of the deposit in years, (5) the unit operating cost, i. e., cost of production exclusive of depreciation and depletion, (6) expected average selling price per unit during the operating life, and (7) the rate of profit commensurate with the risk for the particular deposit. When the deposit has been sufficiently developed these factors may be determined from past operating experience.

In the application of factors derived from past experience full allowance should be made for probable future variations in the rate of exhaustion, quality or grade of the mineral, percentage of recovery, costs of production, and selling price of the product marketed during the expected operating life of the mineral deposit.

* * * * *

(c) Mineral deposits for which these factors may not be determined with reasonable accuracy from past operating experience may, with the approval of the Commissioner, be valued in a similar manner; but the factors must be deduced from concurrent evidence such as the general type of the deposit, the characteristics of the district in which it occurs, the habit of the mineral deposits in the property itself, the intensity of mineralization, the rate at which additional mineral has been disclosed by exploitation, the stage of the operating life of the property, and other evidence tending to establish a reasonable estimate of the required factors.

(d) Mineral deposits of different grades, locations, and probable dates of extraction in a mineral property shall be valued separately. The mineral content of a deposit should be determined in accordance with article 208 in the case of mines, with article 209 in the case of oil wells, and with articles 211 and 212 in the case of gas wells. In estimating the average grade of the developed and prospective mineral, account should be taken of probable increases or decreases as

indicated by the operating history. The rate of exhaustion of a mineral deposit should be determined with due regard to the limitations imposed by plant capacity, by the character of the deposit, by the ability to market the mineral product, by labor conditions, and by the operating program in force or definitely adopted at the basic date for future operations. The operating life of a mineral deposit is that number of years necessary for the exhaustion of both the developed and prospective mineral content at the rate determined as above. The operating cost comprises all current expense of producing, preparing, and marketing the mineral product sold, exclusive of Federal income, war profits, and excess profits taxes, allowable capital additions as defined in article 222, and deductions for depreciation and depletion, but including cost of repairs and replacements necessary to maintain the plant and equipment at its rated capacity and efficiency. This cost of repairs and replacements is not to be confused with the depreciation deduction by which the cost or value of plant and equipment is returned to the taxpayer free from tax. In general no estimates of these factors will be approved by the Commissioner which are not supported by the operating experience of the property or which are derived from different and arbitrarily selected periods.

(e) The product of the number of units of mineral recoverable in marketable form by the difference between the selling price

and the operating cost per unit is the total expected operating profit. The value of each mineral deposit is then the total expected operating profit from that deposit reduced to a present value as of the basic date at the rate of interest commensurate with the risk for the operating life, and further reduced by the value at the basic date of the depreciable assets and of the capital additions, if any, necessary to realize the profits.

ART. 210. * * *

(b) When the value of the property at the basic date has been determined, depletion for the taxable year shall be determined by dividing the value remaining for depletion by the number of units of mineral to which this value is applicable, and by multiplying the unit value for depletion, so determined, by the number of units sold within the taxable year. In the selection of a unit for depletion preference shall be given to the principal or customary unit or units paid for in the product sold.

Regulations 33 (Revised) governing the collection of the income tax imposed by the Act of September 8, 1916:

ART. 172. If the property was acquired by purchase or otherwise (other than by lease) prior to March 1, 1913, the amount of invested capital which may be extinguished through annual depletion deductions from gross income will be the fair market value of the mine property so acquired, as of March 1, 1913. The value contemplated herein as the basis for depletion deductions authorized

by this title must not be based upon the assumed salable value of the output under current operative conditions, less cost of production, for the reason that the value so determined would comprehend the profits to be realized from operation of the property.

Neither must the value determined as of March 1, 1913, be speculative, but must be determined upon the basis of the salable value *en bloc* as of that date of the entire deposit of minerals contained in the property owned, exclusive of the improvements and development work; that is, the price at which the natural deposits or mineral property as an entirety in its then condition could have been disposed of for cash or its equivalent.

The *en bloc* value having been thus ascertained, an estimate of the number of units (tons, pounds, etc.) should be made. The *en bloc* value divided by the estimated number of units in the property will determine the per unit value, or amount of capital applicable to each unit, which, multiplied by the number of units mined and sold during any one year, will determine the sum which will constitute an allowable deduction from the gross income of that year on account of depletion.

Deductions computed on a like basis may be made from year to year during the ownership under which the value was determined, until the aggregate *en bloc* value as of March 1, 1913, of the mine or mineral deposits shall have been extinguished, after

which no further deduction on acount of depletion with respect to this property will be allowed to the individual or corporation under whose ownership the *en bloc* value was determined.

APPENDIX B

SUPPLEMENTARY DISCUSSION OF OPINION OF THE CIRCUIT COURT OF APPEALS

(*a*) The Circuit Court of Appeals held that the depletion rate determined by the Commissioner was not a correct rate because it did not represent the value in place of a ton of ore on March 1, 1913. In so holding, the court, relying entirely upon the Revenue Act of 1916, said (R. 162):

> Section 5 (Eighth-b) of the revenue act of 1916 (39 U. S. Stats. at L., p. 756, 759) provides that there shall be an allowance for depletion "not to exceed the market value in the mine of the product thereof, which has been mined and sold during the year for which the return and computation are made." This language, by its terms, has nothing to do with the whole body of the ore in place. It is not related to the market value of all of the tonnage in the mine, but the depletion relates to the market value in the mine of the product mined and sold during the year for which the return is made.

We submit that the Circuit Court of Appeals has misconstrued the section of the 1916 Act relied upon. The court seems to consider that the mar-

ket value in the mine of the product sold is the *necessary measure* of such allowance. We contend that the statutory provisions quoted in the above extract from the opinion are intended merely to prevent the deduction of a depletion allowance in excess of the income produced by the mine during the year with respect to which the depletion is claimed. This might occur in the case of one who operates a mine at a loss in a given year. It is not intended as the measure of depletion, for this Court has indicated in the *Ludey case, supra,* that the proper allowance under this Act is a *pro rata* part of the capital investment. That the language quoted is a limitation and not the measure of depletion is further evident from the construction given in *Lynch* v. *Alworth-Stephens Co.,* 267 U. S. 364, 369, *supra,* to the provision relating to corporate deductions:

> The general provision in section 12 (a), Second, is that the deduction from gross income shall include a reasonable allowance for the "exhaustion * * * of property." There is nothing to suggest that the word "property" is used in any restricted sense. In the case of mines, a specific kind of property, the exhaustion is described as depletion, and is limited to an amount not exceeding the market value in the mine of the product mined and sold during the year.

The conclusion of the Circuit Court of Appeals upon this point was reached without reference to the provisions of the Revenue Act of 1918, which governs one year involved in this case.

(*b*) The Circuit Court of Appeals assumed that the depletion allowance and March 1, 1913, value were determined by the Commissioner without reference to the interest which the quarterly payments would produce after their respective receipts. There is nothing in the record to justify such an assumption. Indeed it appears to be contrary to the facts, for the present value of $1 to be received at the end of 40 years, discounted at 6%, is 0.097222. Principles of Valuation, Grimes & Craigue, page 224.

Hence, it is perfectly apparent that the Commissioner did not, as the court's opinion states, proceed upon "the assumption that the *value* of the leases to plaintiff at the end of 40 years, will be $7,849,287.18." (R. 160.) This figure (which was not in his final computation) was the aggregate amount of the payments which she might expect under the leases—i. e. for 31,397,148.7 tons at 25 cents per ton, as appears from the figures in the tabulation immediately above this statement in the opinion.

(*c*) The "average extraction, 1913 to 1918," inclusive, is criticized by the court (R. 161) because, at the time this case was tried, it appeared that the extraction for 1917 and 1918 was vastly in excess of the earlier years. On March 1, 1913, the date as of which the value, and consequently the rate of extraction, must be determined, it would not have been possible to foresee and therefore to modify the lessees' extraction programs in the light of the demand created by the World War. The extraction program as well as the reserve is at best an estimate.

(*d*) The fact adverted to by the court (R. 161) that some leases had a shorter life than 40 years does not by any means show that the entire resources would be exhausted before that time. It could, for valuation purposes at least, make no possible difference to the lessor whether the royalties were paid in respect to one mine or another. The short-term leases were held by those who also held the long term, and it may well have been that the whole was to be extracted in 40 years at an average rate.

(*e*) The court says (R. 162):

> It can not be possible that the 1913 value can be fixed by the lease at .0886243 and at the same time have the lease yield to plaintiff 25 cents per ton for 1913 and every succeeding year of operation.

One who invests his capital to be repaid him in installments, over a long period, contemplates receiving each year income on his remaining investment, not merely on that part of his investment which he recovers in the year.

According to Hoskold's Table, the present value of $1 in accumulated earnings of equal annual installments over a period of 40 years on the basis of interest at 6% on the investment with a return of capital at 4%, is 0.354491. Saliers, Depreciation, Principles and Applications, pp. 467–468. On this basis 25 cents would have a present value of 0.08862+.

(*f*) The statement of the "Government's figures and processes" set forth in the opinion (R. 160) is taken from the taxpayer's Exhibit K. (R. 128.) But it is clear from the record that there were

later computations which gave different results and that Exhibit K does not show the manner in which the allowance was finally computed. The depletion allowance for 1917 is shown on Exhibit K as $92,194.92, but the certificate of overassessment for 1917 (Plaintiff's Exhibit M, R. 138–139) and the claim for refund for 1917 (Plaintiff's Exhibit R, R. 144–145) show that the final allowance for depletion was in fact $99,561.20. Likewise the allowance for 1918 was increased by the Commissioner, and instead of $77,968.20 (Plaintiff's Exhibit O, R. 141), $84,979.55 was finally allowed (Plaintiff's Exhibit P, R. 143).

APPENDIX C

EXTRACT FROM THE RECORD IN McHALE v. HULL

The following is an excerpt from the Agreed Statement of Facts (R. 48–49) in *McHale* v. *Hull*, No. 3780, in the Circuit Court of Appeals for the Seventh Circuit. This is the case referred to by the District Court (R. 44) and by the Circuit Court of Appeals (R. 159) in the instant case.

> The computation of the March 1, 1913, value of the plaintiff's royalty equity in each mine under each indenture was made by said Commissioner as follows:
>
> (1) The rate of royalty per ton was multiplied by the total estimated tonnage of ore to determine gross expected royalty income.
>
> (2) From gross expected royalty income a deduction of three per cent was made to determine net expected royalty income; as the said Commissioner has determined that the

average cost incurred by all lessors of iron mines in Minnesota for legal, engineering, accounting and other services, and for office expenses in connection with royalty collection amounts to approximately three per centum of the total royalties received.

(3) The March 1, 1913, value of the net expected royalty income was determined by multiplying the net expected royalty income by a discount factor. This discount factor was selected in accordance with the sinking fund method for valuing equal annual amounts of income. By this method the net expected royalty income (which said Commissioner assumed would be in equal annual amounts from March 1, 1913, to the end of the unexpired term under each indenture), pays simple interest of six per centum annually upon the March 1, 1913, value, so determined, and provides annually, in addition, a residuum of equal annual amounts which, if invested to accumulate at four per cent interest, compounded annually, would provide for the return of the March 1, 1913, value of the net expected royalty income under each indenture, at the expiration of the term of each indenture. The depletion rate per ton of ore for which royalty payment was received by the plaintiff in 1917 was computed by said Commissioner, by dividing the March 1, 1913, value of the net expected royalty income by the total estimated tonnage of ore in the mine subject to each indenture. The depletion deduction from gross income of $99,561.20, was

computed by said Commissioner as the sum of the amounts under each indenture determined by multiplying the several depletion rates per ton by the tonnages of ore for which royalty payment was received by the plaintiff during 1917, under the several indentures.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1928.

No. ~~360~~ 59

MABEL G. REINECKE, COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF ILLINOIS,
Petitioner.

vs.

EUDORA HULL SPALDING,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

JOHN M. ZANE,
ALFRED T. CARTON,
Counsel for Respondent.

BUNTHORP-MARSEN PRINTING COMPANY, CHICAGO.

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Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I.

There is no reviewable error presented by any assignment of error in the record.

To show this point it is necessary, in the absence of any statement in the petition as to how any error is claimed to arise, to state that this action was brought to recover income tax unlawfully exacted from respondent in the years 1917 and 1918, which taxes were imposed upon iron ore royalties fixed in leases prior to March 1, 1913 at 25 cents per ton. The law in 39 Stat. at L., 756, Part I, Individuals, Section 1 (a), provides for a

tax upon the net income of individuals. It also provides, in order to ascertain such net income, a deduction for depletion of mines fixed in Section 5 (a), quoted in the petition (p. 2), with reference to "the market value in the mine of the product thereof which has been mined and sold during the year for which the return and computation are made."

The statute for 1918 (quoted in Petition, p. 3), while differing in words, does not differ in effect, for both acts have Section 2, 39 Stat. L. 758:

> "(c) For the purpose of ascertaining the gain derived from the sale or other disposition of property, real, personal or mixed, acquired before March 1, 1913, the fair market price or value of such property, as of March 1, 1913, shall be the basis for determining the amount of such gain derived." (This section is quoted *Lynch* v. *Alworth Stephens Co.* 267 U. S. 364, 368.)

The property disposed of is iron ore. The passing of title, on sale or disposition of ore from lessor to lessee under the leases, takes place upon extraction and not until then.

> *United States* v. *Biwabik Mining Co.* 247 U. S. 116.

It is apparent that the disposition of ore when extracted under a lease is a form of sale or disposition of property as a capital asset and the basic capital value is "market price," March 1, 1913.

The cause was tried to a jury. At the end of all the evidence the defendant, now Petitioner, moved for an instructed verdict for defendant, and plaintiff, now Respondent, made a counter-motion for plaintiff (Printed Rec., 55), and there being no question as to amount of the verdict, if for plaintiff (Printed Rec., 56), the court stated that the effect of the motions was a submission of

the facts to the court for decision (Printed Rec., 56), and thereupon instructed the jury to find for the plaintiff, and to assess plaintiff's damages at the sum of $118,043.12, to which the defendant excepted (Printed Rec., 57). The defendant made no request to go to the jury either before or after the ruling made, nor asked any withdrawal of its peremptory request after it was ruled upon.

The case of *Buetell* v. *Megone*, 157 U. S. 154, 157, is controlling, an exactly similar case, which holds:

> "The facts having been thus submitted to the Court, we are limited in reviewing its action, to consideration of the correctness of the finding on the law, and must affirm if there be any evidence in support thereof." (Citing cases.)

The case of *Empire State Cattle Co.* v. *Atchison, etc. R. Co.* 210 U. S. 1, has no bearing here.

The sole matter that can be assigned for error on such a record as this, is that there was no sufficient evidence to sustain the finding. In the assignment of errors in the Circuit Court of Appeals there is no such error assigned. (Printed Rec., 213.) If, however, such error had been assigned, this Court would not depart from its rule that where the facts are found in the trial court and confirmed in the Circuit Court of Appeals, this Court will not search through the record to find whether the finding as made in the courts below is supported by the evidence.

The petition for certiorari (p. 8), in its statement of error, does not refer to any assignment of error relied upon, and does not say or assert that there is not evidence in the record to support the finding of the District Court. It results that the assignment of error necessary to review this record is not in the record.

Even if there was such assignment and the Court should be disposed to pass on the evidence, a writ of cer-

tiorari ought not to be granted, for the only review that can be had is whether there is any evidence to support the finding, and that there was such evidence and no other evidence is apparent from the record. To this matter is the next point.

II.

As to whether there was evidence to support the finding of the lower court, there ought to be no question on this record.

The thing that is being disposed of is ore which had a market value provable as a fact and such fact was proven for all material dates.

The case for the plaintiff on the law was to show the basis of depletion, which was stated in *Lynch* v. *Alworth-Stephens Co.* 267 U. S. 364, 370, construing the statute in a case where depletion of both lessor and lessee was involved:

> "There is an exhaustion of property in the one case as in the other; and the extent of it, with the consequent deduction to be made, in each case is to be arrived at in the same way; namely, by determining the aggregate amount of the depletion of the mines in which the several interests inhere, based on the market value of the product, and allocating that amount in the proportion of the interest of each, severally considered."

Having determined this "market value in the mine of the product which has been mined and sold during the year," (quoting statute), the next thing is to determine the market value of that product on March 1, 1913, for, if the market value had increased since March 1, 1913, under these leases existing prior to March 1, 1913, there was a profit on capital on the sale or disposition, if the sale was at an increased market value. Both market values

were proven to be at least 25 cents per ton (Printed Rec., 31, 32, 34, 36), so there could be no capital profit in a disposition of the ore at 25 cents per ton, except as capital interest was contained in the royalty payments as deferred from March 1, 1913, to the date of payment, for every payment for capital deferred without interest contains in itself both principal and interest thereon for the deferred period.

Foley v. *Fletcher*, 3 H. and N. 769;
Secretary of State v. *Scoble* (1903), A. C. 299, in income tax cases.

The evidence in the record consists of the income tax returns of the plaintiff for the years 1917 and 1918 (Printed Rec., 29, 59-73, 75-80); the total tonnage extracted from all the mines in 1917 and 1918 (Printed Rec., 30), and the plaintiff's part of the extraction as one-sixth thereof (Printed Rec., 30); and the leases, so-called, made prior to March 1, 1913, fixing a royalty of 25 cents per ton (Printed Rec., 37, 90-170) and the plaintiff's one-sixth interest in the extracted ore. By reason of the leases plaintiff's interest could not exceed 25 cents per ton on one-sixth of the tonnage extracted or one-sixth of 25 cents on all tonnage extracted. It was admitted on the record that the plaintiff made her original returns in good faith, without any intention to defraud. (Printed Rec., 38.) The plaintiff proved by competent witnesses that the ore in the mine on March 1, 1913, was merchantable iron ore, unusually good in quality, containing fifty-four per cent of iron and that the fair market value of each ton of ore then and there in the mine, untouched and unextracted, was on March 1, 1913, and thenceforward throughout 1917 and 1918, and throughout 1917 and 1918, and throughout the intervening time, at least 25 cents per ton. (Printed Rec., 31, 32,

34, 36.) The plaintiff offered in evidence the papers showing what she had been compelled to pay as income tax for the years 1917 and 1918, and the claims for refund duly made. Then she offered in evidence calculations showing the amount of income tax overpaid (Printed Rec., 43, 44), and an accountant testified, as to the sums paid quarterly in the years 1917 and 1918, how much thereof was principal and how much was interest at the rate of five per cent for the period of deferment of payment from March 1, 1913, up to the date of payment (Printed Rec., 46, 47).

The plaintiff had thus shown as a basis of capital depletion the market value of the product mined and sold during the year, that the market value of March 1, 1913, was not exceeded in the sale or disposition of the extracted ore, but was reached, and that all of that market value was capital on March 1, 1913, except the amount therein contained which represented interest on the payments deferred from March 1, 1913, which interest had been shown, and the remainder was necessarily capital depletion.

Thereupon, the defendant put upon the stand a witness who was asked (Printed Rec., 50) what was the customary method in the mining industry of determining depletion, which does not seem to be material, and the witness said, "we take the value of the mine of March 1, 1913, and the tonnage of ore in the mine as of that date, and divide the value of the mine by the tonnage to get a factor to be used for depletion, then in any one year the number of tons of ore extracted in that year times the factor give us the amount of the depletion for that year." (Printed Rec., 52.) The witness also stated in answer to the court that there are two things to determine, a figure which represents the tonnage of the mine, and the figure that has been ar-

rived at as to the value of the mine, and the witness said that he did not intend to make any statement as to how to ascertain the value of the mine. (Printed Rec., 52.) This left uncontradicted the value of the ore bodies proven as to ore disposed of in the year of extraction and on March 1, 1913, the basic date, of 25 cents a ton. No attempt was made by this witness to show any other value to the ore bodies except that proven by the plaintiff's witnesses. No other witness was sworn for the defendant.

The Petitioner asserts now that market value of the ore in the mine is not the proper measure of the value of the capital asset but on that point no evidence whatever was offered by the defendant. The evidence of plaintiff was uncontradicted, and the District Court found on that evidence as the only evidence, and its finding is unassailable as has been shown.

In the Circuit Court of Appeals, reliance was placed upon the figuring of accountants in the income tax department used to fix the tax. That method of figuring was disposed of in the opinion of the Circuit Court of Appeals in this case *Reinecke, Collector* v. *Spalding,* 30 Fed. (2d) 369. But on the trial the counsel for the defendant had stated that this "method used by the Commissioner is entirely immaterial in this case." (Printed Rec., 39.) Since the defendant offered no evidence at all to show the correct method of determining the market value of the ore, and asserted that the Commissioner's calculation was immaterial, the trial court could do nothing else under the Government's contention than decide upon the evidence as it stood and the evidence supported his decision.

In the petition for certiorari, the Petitioner asserts (p. 8) that:

"The proper allowance should be computed by de-

> termining the percentage of the whole reserve which was withdrawn and paid for during the taxable year, and taking this same percentage of the plaintiff's capital investment, that is, of the March 1, 1913, value of the plaintiff's interest in the mine. In other words, the depletion in dollars is the same percentage of the capital investment as the depletion in tons is of the whole reserve."

This is precisely the method followed in the lower court. We are to ascertain the depletion of Respondent's undivided one-sixth interest in an ore body. The market value on March 1, 1913, is the measure, which is limited however by the leases to 25c per ton. The proof was full and uncontradicted that the market value on March 1, 1913, and at all times thereafter through 1918 was at least 25c per ton. This was a fact of market value at the time and place. (Printed Rec., 31, 32, 34, 35.) The petitioner's claim is merely another way of stating the finding of the lower court. Eliminating for the moment the question of interest, the lower court gave as depletion for each year an amount in dollars bearing the same percentage to the market value of the respondent's total ore body on March 1, 1913, as the tons extracted bore to the respondent's total tonnage in the mines. We may take an illustration, using for convenience small figures. If the assumed ore reserve in the mine is 600,000 tons, the respondent's one-sixth undivided interest is 100,000 tons. The market value of each ton on March 1, 1913, and thereafter through 1918, was at least 25c per ton, and the value of respondent's interest was $25,000, being limited to that because of the leases. If the extraction in 1917 was 120,000 tons, respondent's share was 20,000 tons. The percentage of the whole reserve withdrawn in 1917 was 20 per centum. Taking this percentage of the respondent's capital value gives $5,000, which is precisely what the lower court allowed except that it

took out of such amount interest from March 1, 1913, to date of payment because such payment was deferred. Any other assumed extraction and any other assumed reserve, will give precisely the same result, and this is precisely what Petitioner states and what Respondent claims and the lower court granted.

So far as the record shows this method is in accordance with the regulations of the department, and there was no violation of those regulations by the lower court (see page 4, 5, of Petition). The depletion on the value of the property in the ore on the basis date, March 1, 1913, was determined by applying that basic value to the product of the year of the return according to the regulation. Preference was given to the principal or customary unit paid for the product sold, for that is a market value. This is according to the regulation. The amount of capital applicable to each unit was determined as stated in the regulation, and that unit applied. In fact, there was no contradicting testimony. On the lower court's allowance of depletion with interest deducted out of depletion on deferred payments, the depletions in successive years can never reach the market value of the whole body of ore in the mine, whatever it may be. The best feature of the statute as applied by the court in this case is that the method of the statute and the regulation thereunder works, whatever the suspected reserve, *i. e.*, ore in the ground, may be.

The Commissioner has issued a regulation which can be lawfully used so that no capital will be taken as income, but the same regulation, if arbitrarily used, can make, by arbitrary figuring, regardless of market value facts, a value for the ore in the mine on March 1, 1913, that is less than the standard of the law, which is the market value. But it is the settled law that under the

guise of an income tax no part of the capital value can be taken as income.

Doyle v. *Mitchell Brothers Co.* 247 U. S. 179.
Eisner v. *Macomber,* 252 U. S. 189.

The fact that the regulations of the Commissioner can be and have been used in a lawful manner by the lower court in arriving at depletion, is no reason why the Government should complain because those same regulations might have been used by arbitrary figuring in an unlawful manner to reach an unlawful result by taking capital as income. "The law is good, if the law be lawfully used."

It is asserted in the petition that the amount of depletion of mines, if any, is discretionary with Congress. This is a total error. If an excise tax is laid on the product of mines, the amount of either depletion or depreciation to be allowed is, under former rulings, discretionary with Congress. But under an income tax law, the authoritative decisions are that no part of the capital can be taken as income, because it is not permitted by the terms of the Constitutional Amendment, or by the terms of an income tax law itself. (See cases last *supra.*)

It is said in the petition that the decision here contradicts the case of *New Creek Company* v. *Lederer,* 295 Fed. 433, and the case of *United States* v. *Ludey,* 274 U. S. 295. The *Lederer* case was a case where the question here did not appear at all, but no allowance for deferred payments on interest was taken from depletion, and the whole product of the mine was claimed as depletion, although there were deferred payments. In the *Ludey* case the question was, upon a sale of capital assets, whether depletion allowable or depletion taken was to be deducted from the cost price in order to ascertain

how much the selling price exceeded the cost price, in ascertaining the profit on a sale.

The Ludey case is stated on page 14 of the petition, according to the Government's construction of it, "namely, that each ton of ore in the mine represents a proportionate part of the taxpayer's capital investment and that, accordingly, the extraction of one ton of ore depletes the taxpayer's capital in the same proportion as it depletes the mineral content." This is what the lower court decided in fact. The tonnage is being disposed of and each ton's market value not exceeding the March 1, 1913 value depletes the capital investment in the same proportion that the tonnage extracted depletes the total tonnage, whatever it is.

The statement on page 13 of the petition ought to be the exact opposite of what it is, for the allowance permitted by the Circuit Court of Appeals in this case cannot result in the return of the taxpayer's entire capital prior to the exhaustion of the mine. It can not result in his never receiving tax-free his whole capital investment, and it must result in his receiving back the last of his capital investment with the exhaustion of the last of the ore and it must result in a return of capital in step with actual exhaustion. No other result is possible. The fact that such is the result is the reason why the statute is just.

All the statements made in the petition, as to the effect of this decision is reversing the regulations or calculations heretofore used, are based upon no evidence in the record except certain abstruse calculations which the counsel for the plaintiff in the lower court expressly repudiated and which are not in the petition relied upon. The petition itself shows that the method adopted by the lower court was correct. It has been shown that the

regulations were followed word for word in determining market values and the unit of depletion per ton. Nowhere in this record can be found what other rule, if any, for ascertaining values, the Government contends for. This petition for certiorari seems to be based on the proposition that a certiorari should be allowed in a case in order to determine the correctness of some method of ascertaining market value which was never put before the lower court, and which is not stated now. In other words, the judgment of the lower court ought to be reviewed for the purpose of trying some other case than the one which was actually tried.

We submit that the petition and the accompanying brief show no ground for the issuance of a writ of certiorari.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1929.

No. 59

MABEL G. REINECKE, COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF ILLINOIS,

Petitioner,

vs.

EUDORA HULL SPALDING,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF AND ARGUMENT FOR RESPONDENT.

JOHN M. ZANE,
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Counsel for Respondent.

CENTROOF-BARNES PRINTING COMPANY, CHICAGO.

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BRIEF AND ARGUMENT FOR RESPONDENT.

I.

STATEMENT OF THE CASE.

There were two counts in the declaration, one (R. 1-8) for income taxes overpaid by the plaintiff for the year 1917 in the sum of $36,123.93, and a second count (R. 8-15) for such taxes overpaid for the year 1918 in the

sum of $65,028.10. No point arises on the pleadings or on the amount of recovery, if the method used as the plaintiff's basis of calculation is correct. The matter in issue was and is solely one of ascertaining depletion. The contention of the Government is that the market value on March 1, 1913, is not the basis for ascertaining depletion. The contention of the respondent is that allowances for depletion are to be based on comparative market values of ore in the ground as between March 1, 1913 and the year of extraction, but such allowances cannot exceed the March 1, 1913 market value of the ore in the ground being accounted for nor can they exceed the market value of the ore being accounted in the year of extraction.

The case was tried before the District Court to a jury, and all the evidence (R. 45) offered preserved in a bill of exceptions (R. 20-157), containing oral testimony (R. 20-46) and Exhibits A to X (R. 46-151). At the close of all the evidence the defendant as well as the plaintiff moved for an instructed verdict (R. 43), neither party thereafter asking to go to the jury. The amount recoverable on plaintiff's theory was not in dispute (R. 43).

The court instructed the jury to find for plaintiff in the amount of $118,043.21, resulting on plaintiff's contention. The jury returned such a verdict (R. 18). Judgment was entered thereon (R. 19). An appeal was taken to the Circuit Court of Appeals for the Seventh Circuit, which court affirmed the judgment on January 2, 1921 (R. 159), in an opinion, *Reinecke* v. *Spalding*, 30 Fed. (2d) 369 (R. 159-163). To this latter judgment of the Circuit Court of Appeals this certiorari was granted.

II.

STATEMENT OF THE EVIDENCE.

The evidence briefly stated was the following:

The plaintiff offered her income tax returns for 1917 and 1918 (R. 21) Exhibits A and B (R. 47, 55), and then showed her receipts of royalties under certain leases quarterly during 1917 and 1918 (R. 22). It was admitted that the plaintiff made her original returns in good faith without any intention to defraud (R. 29). Leases of the iron ore properties in question were offered (R. 28), Exhibits C to I, both inclusive (R. 63, 75, 83, 92, 100, 108, 116). They covered different tracts of land in St. Louis County, Minnesota. Lease Exhibit C (R. 63), as an instance, covered six different tracts, for the term of forty-five years from January 1, 1905, for the first five tracts, and fifty years from such date for the sixth tract, for the purpose of taking out the merchantable iron ore (R. 65) upon a royalty reserved of twenty-five cents per ton upon such ore mined and shipped (R. 66), with a compulsory minimum of extraction of 600,000 tons per year for the first forty-five years, and for the remaining five years of 300,000 tons. The minimum was to be paid quarterly each year (R. 67), and any ore paid for beyond extraction was to be applied in a subsequent year or years to pay for any extraction beyond the minimum (R. 67). The lessee was to pay all taxes and assessments (R. 69). The plaintiff leased an undivided one-sixth of the premises (R. 69). The lease was terminable by the lessor upon thirty days' notice for a sixty days' default in paying royalties or in performing conditions (R. 71), and by the lessee upon thirty days' notice without cause shown (R. 70).

The other leases were for different tracts for yearly minima varying from 100,000 tons, 50,000 tons, 75,000 tons per year, and terms varying from fifty years from July 1, 1902, fifty years from January 1, 1903, fifty years from October 1, 1902, twenty-five years from October 1, 1903, the other provisions being constant (R. 63-124). At the beginning of 1917 fifteen years of the term had expired on some leases and on one lease only eleven years of the term were unexpired.

The next exhibits, K and L, were letters from the Commissioner's deputy, showing a refiguring by the Department of depletion in 1917 from that taken by the taxpayer and likewise that of 1918 (R. 128, 130). The unit ton value of depletion for both years on the ore extracted was stated to be 8.8 cents per ton (R. 128, 130, 136, 141). When these papers were offered it was objected, first, that the method used by the revenue agent had no tendency to show the method used by the Commissioner (R. 29). But the figures show the method of calculating the depletion and the reasons for the additional amount of tax exacted for both years. The second objection was that the method used by the Commissioner was entirely immaterial (R. 30). Later the objection was said to be that "if the Commissioner made a mistake in applying his own method, then I am objecting." (R. 31.)

The figuring of this unit depletion per ton was shown in the letter, Exhibit K (R. 128) of the Commissioner as follows:

> "Your method of deducting from gross income the entire amount received as royalty from iron mines as depletion is not approved by this office. The correct amount to be deducted for depletion, based upon the unit cost per ton of mineral reserves, as of March 1, 1913, as determined by the Valuation Engineers of this Department is shown as follows:

Ore reserve, March 1, 1913, according to the Minnesota Tax Commission, as shown on questionnaire of the Royal Mineral Association, ... tons.	191,417,150
Less: Advance royalty payment by lessees, prior to March 1, 1913, on ..... tons.....	3,034,258
Net tonnage as of March 1, 1913.....	188,382,892
Your interest, one-sixth, March 1, 1913 ..... tons	31,397,148.7
Total average extraction, 1913 to 1918, inclusive ..... tons.....	4,770,000
Maximum life of mine allowed ..... years	40
Interest rate allowed.....	6%
Royalty rate per ton.....$	0.25
Your capital sum returnable in 40 years .....$	7,849,287.18
Present worth of your interest, March 1, 1913 .....$	2,782,551.64
Unit cost per ton, March 1, 1913, basis for depletion .....$	0.0886243
Depletion in 1916, 1,096,015.4 tons at $0.0886243 .....$	97,133.60
Depletion in 1917, 1,040,289.4 tons at $0.0886243 .....$	92,194.92

The additional taxes in the amount as noted above will be assessed at an early date and notice as to place and time of payment will be sent you by the collector of internal revenue for your district.

Respectfully,

(Signed) G. V. NEWTON,

Acting Assistant to the Commissioner."

The depletion of 1916 is not in question here, but rather that of 1918, the calculation for which has a cross reference to the year 1917 as its justification for the figure .088 as the depletion unit per ton (R. 133).

In this figuring the net upaid for ore reserve of all lessors was taken as of March 1, 1913, at 188,382,892 tons and the taxpayer's interest of one-sixth was taken for the taxpayer at 31,397,148.7 tons. Then the total

average yearly extraction for the years 1913 to 1918, inclusive, was figured, so as to reach an average, using even the 1918 extraction, as to which the taxpayer, figuring for 1917, could have no prophetic knowledge. Roughly the average yearly extraction divided into the total net assumed ore reserves made the figure 40. Thereupon an average maximum life of the mines was fixed at forty years. This involved the assumption that from all the mines ore would be extracted for forty years and that the leases would last just forty years and no longer, nor for any lesser period. The capital sum returnable in forty years to this taxpayer was figured by multiplying the net tonnage of the taxpayer as of March 1, 1913, by twenty-five cents as royalty per ton, which gave $7,849,287.18 as this taxpayer's total return for the forty years assumed. The next figure given is the present worth of the taxpayer's interest under the lease on March 1, 1913. This is found by assuming that the net tonnage in the mines of March 1, 1913, will be taken out in forty equal annual extractions over forty successive years.

To this assumed forty equal extractions is applied the statement:

> "The value of the total royalties to be received during life of mines discounted of March 1, 1913, at six per cent and four per cent interest gives a unit value as of March 1, 1913, of $0.0886243 a ton." (R. 141 at bottom of page.)

The method is as follows: The one-sixth of the ore reserve of this taxpayer is treated separately. Each of the assumed forty equal annual extractions is divided into two parts. One part is assumed to go to the taxpayer as returns of the mine at six per centum per year on the present value to be ascertained. The other part is assumed to go into a sinking fund to draw interest at the rate of four per centum per year to the end of the

forty years. Interest is calculated on each of these sinking fund payments from the assumed yearly extractions at the rate of four per centum up to the end of the forty years from the year of payment. Those annual sinking fund parts of the assumed forty yearly equal extractions, with the interest calculated on each, are added together and the total is said to be the thus ascertained present value of the taxpayer's interest in the lease. This is admitted to be the Hoskold formula method in petitioner's brief, page 37. Then this assumed value of the mine so calculated is divided by the number of tons of the taxpayer in the net ore reserve on March 1, 1913, and the calculation gives eight and eight-tenths cents with a continued fraction, which is called the unit cost per ton on March 1, 1913, as the basis for depletion. Then that depletion unit of .088 is applied to the taxpayer's one-sixth of the tonnage extracted during the year 1917, and the result is said to be the taxpayer's depletion for the year 1917 (R. 128). The same unit is applied to 1918 (R. 141). Exhibit P corrected this calculation (R. 143) in a small amount which was arrived at as a total for all the leases by figuring equal extractions per year in each lease for the years of unexpired term, making the depletion unit a different one for the leases.

While the petitioner's brief, at page 4, states that "the record does not clearly show the method used by the Commissioner in computing the allowances," the brief in Appendix C, at page 38, states the method as taken from the Agreed Statement of Facts in *McHale* v. *Hull*, 16 Fed. (2d) 781, where precisely the same question was involved as follows:

> "The March 1, 1913, value of the net expected royalty income was determined by multiplying the net expected royalty income by a discount factor.

This discount factor was selected in accordance with the sinking fund method for valuing *equal annual amounts* of income. By this method the net expected royalty income (which said Commissioner *assumed* would be in equal annual amounts from March 1, 1913 to *the end of the unexpired term under* each indenture), pays simple interest of six per centum annually upon the March 1, 1913 value, *so determined,* and provides annually, in addition, a residuum of equal annual amounts which, if invested to accumulate at four per cent interest, compounded annually, would provide for the return of the March 1, 1913 *value* of *the net expected* royalty, *under each indenture,* at the expiration of the term of each indenture. The depletion rate per ton of ore for which royalty payment was received * * * was computed by the Commissioner, by dividing the * * * value of the net expected royalty income by the total estimated tonnage of ore in the mine subject to each indenture."

This is Hoskold's formula applied to each lease separately and assuming equal annual extractions during the years of the unexpired terms, thus resulting in a different unit of depletion for each lease.

Exhibits N and Q were the checks of plaintiff that paid the new assessments (R. 130, 140, 144). The remaining exhibits were claims for refunds and refusals thereof and Exhibits V, W and X were the calculations to show the reformed return with the resulting overpayment of tax with the amounts thereof and to show the amount of the quarterly payments, less interest therein contained from March 1, 1913, considering the payments as deferred from March 1, 1913, to the date of actual payment of royalties. The amounts that were principal in the payments were the amounts of money which, put at simple interest on March 1, 1913, at five per centum, would amount with that interest to the amount of the particular payment of royalty when made (R. 151). The

actuary showed the correctness of these calculations at five per centum interest (R. 36). These principal sums were the depletion from which interest was excluded. There is no contest over these latter calculations for plaintiff, if the method is correct.

The plaintiff proved by competent witnesses (R. 22, 27) the market value of each ton of iron ore extracted in 1917 and in 1918 and the market value of that ore on March 1, 1913, and for all the intervening period, to be at least twenty-five cents per ton (R. 23, 26, 27). The witnesses testified to the high merchantable character of the ore and the market value given was for the iron ore by the ton in the mine untouched and unextracted (R. 23) of all of the tonnage in place in the mine, whatever it might be, regardless of who owned it or what was the lease upon it (R. 25). One witness on cross-examination showed that what the Government's counsel was trying to get at was a method of figuring the plaintiff's (Mrs. Spalding's) interest in a lease, and not market value of ore (R. 24).

The defendant's only witness was first asked the method used in providing depletion out of income for amortization of bond issues (R. 37). Then the witness was asked to decide the legal question involved in the case (R. 38). Then the witness stated, under objection, that with reference to depletion "you take the tonnage as of March 1, 1913, and the value of the mine at that date, and you divide tonnage into value to get the value of a ton for depletion." (R. 40.) And then the witness said that his answer was based on no method stated as to fixing value of mine or tonnage. (R. 40, 41).

III.

THE STATUTES APPLICABLE FOR 1917 RETURN.

The general provisions of the statute for income tax returns of 1917 was the act of September 8, 1916, found at 39 Stat. L. 756, 758, Fed. Stat. Anno. Sup. 1918, p. 312, as follows:

> "Sec. 1 (a). That there shall be levied, assessed, collected and paid annually upon the entire net income received in the preceding calendar year from all sources by every individual, a citizen or resident of the United States, a tax of two per centum upon such income." (Other taxes were added upon this net income.)

The next general provision was as to what was included in income.

Fed. Stat. Anno Sup. 1918, p. 313, 314:

> "Sec. 2 (a). That subject only to such exemptions and deductions as are hereinafter allowed the net income of a taxable person shall include gains, profits, and income derived from * * * businesses, trade, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in real or personal property, also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever."

(Sec. 2 (b) refers to estates of deceased persons and trustees and other fiduciaries.)

> "Sec. 2 (c). For the purpose of ascertaining the gain derived from the sale or other disposition of property, real, personal, or mixed, acquired before March first, 1913, the fair market price or value of such property as of March first, 1913, shall be the basis for determining the amount of such gain derived."

* * * * *

"Sec. 5. That in computing net income in the case of a citizen or resident of the United States—

(a) For the purpose of the tax there shall be deducted as deductions—

First. (Necessary expenses)
Second. (Interest paid)
Third. (Taxes paid)
Fourth. (Losses incurred in business)
Fifth. (Losses incurred not in business)
Sixth. (Bad debts)
Seventh. (Depreciation of property)
Eighth. (a) (in the case of oil and gas wells)

(b) In the case of mines, a reasonable allowance for depletion thereof not to exceed the market value in the mine of the product thereof which has been mined and sold during the year for which the return and computation are made, such reasonable allowance to be made in the case of both (a) and (b) under rules and regulations to be prescribed by the secretary of the treasury: Provided, that when the allowances authorized in (a) and (b) shall equal the capital originally invested or in case of purchase made prior to March first, 1913, the fair market value as of that date, no further allowance shall be made."

IV.

STATUTES APPLICABLE IN 1918 RETURNS.

The statute of February 24, 1919, for income tax returns of 1918, provides, 40 Stat. L. 1060, Fed. Stat. Anno. Sup. 1919, p. 92:

"Sec. 202 (a) That for the purpose of ascertaining the gain derived or loss sustained from the sale or other disposition of property, real, personal or mixed, the basis shall be—

(1) In the case of property acquired before March, 1913, the fair market price or value of such property as of that date:

(2) (In the case of property acquired after that date).

It was provided in the same statute, 40 Stat. L. 1062, Fed. Stat. Anno. Sup. 1919, p. 94:

> "Sec. 210. That in lieu of the taxes imposed by subdivision (a) of section 1 of the Revenue Act of 1916 and section 1 of the Revenue Act of 1917, there shall be levied, collected and paid for each taxable year upon the net income of every individual a normal tax at the following rates:
>
> For the calendar year 1918, twelve per centum of the amount of the net income in excess of the credits provided in section 216." (Then followed other brackets.)

40 Stat. L. 1066, Fed. Stat. Anno. Sup. 1919, p. 99:

> "Section 214. Deductions allowed. (a) That in computing net income there shall be allowed as deductions (here followed nine different deductions).
>
> (10) In the case of mines, oil and gas wells, other natural deposits and timber, a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions in each case, based upon costs, including cost of development not otherwise deducted: Provided, that in case of such properties acquired prior to March first, 1913, the fair market value of the property (or the taxpayer's interest therein) on that date shall be taken in lieu of cost up to that date * * * such reasonable allowance in all the above cases to be made under rules and regulations to be prescribed by the Commissioner with the approval of the Secretary. * * * In the case of leases the deductions allowed by this paragraph shall be equitably apportioned between the lessor and lessee."

It will be seen that what is implied in the statute for 1917 is expressed in the statute for 1918, namely, that the provision as to depletion is a particular instance of a conversion of capital resulting in gain or income or loss.

V.

PROCEEDINGS IN CONGRESS ON ENACTMENT.

The intention of Congress in enacting the provision for depletion, so far as it is evidenced by the proceedings that we have found, is shown in the following record of the Senate:

The eighth deduction of the statute for 1917 was a senate amendment to the House Bill, and what was said is the only discussion, either in Senate or House, that appears to have been had on this provision.

When the amendment came before the Senate along with the other amendments to the House Bill reported by the Senate Committee, a discussion was had first as to the provision for oil wells and as to whether, under the provision as to oil wells, the taxpayer was compelled to pay a tax upon capital. Then the discussion passed to mines. Mr. Oliver, of Pennsylvania, stated that the producer should be allowed credit for the value in the ground. Mr. Williams, of Mississippi, in charge of the bill, stated very clearly that the intention of the bill was not to allow capital to be taxed under the guise of taxing income.

The discussion, so far as it is material, was as follows (53 Congressional Record, Senate p. 13285):

Mr. Williams (Miss.) stated in substance:

> The Committee does not think that this will result in taxing any part of the capital as income; that under the present law only 5 per cent of the gross value (income) was allowed to be deducted and that that was considered too little and a more equitable deduction was desired. (P. 13286, bottom of first column.)

Again he said (p. 13286, second column):

> "The rule that was fixed by the present law applied not only to oil wells and gas wells but to coal

mines and to metallic mines and to timber and to that entire class of industries with a self-consuming plant. It goes without saying that in all those cases a part of the product which is sold by the industry is a part of its capital. The desire was to tax the income part of what was sold and not to tax the capital part. We found that in connection with coal mines we could do that by fixing the value of the coal in the ground, but you cannot do that with oil or with gas. No living human being would know how to do it."

Then Mr. Williams proceeded to make an explanation that was incorrect, as to mines:

"Mr. Williams: If the Senator will notice the bill he will see that we have adopted a different rule for metallic mines and for coal mines, for the very reason that I have stated. The Senate committee undertook to try to fix a rule that would be just in each case. Of course, you can tell the value of the coal in the ground, because coal is coal; but you cannot tell the value of copper in the ground, nor the value of gold, nor the value of silver, because the ore when it comes out is neither gold nor silver nor copper; it is mixed with various other things. So we kept the old 5 per cent provision with regard to them, and then made a new rule as to gas and oil, and then we made a new rule as to coal, and then we changed the rule with regard to metallic mines by hedging it around so that the department could not, by ruling, do what it has done.

Mr. Chilton: Mr. President, I think the Senator will find he is mistaken in that statement. We tried to find a rule that would apply to all mines, and, hence, it was provided that they should have a deduction for all of the product mined and sold during the year, and I think the Senator is mistaken in saying that there was a different rule for metallic mines.

Mr. Thomas: The Senator said there was originally a different rule.

Mr. Chilton: Originally, but there is not now.

Mr. Williams: Oh, I remember now that in caucus that was changed upon the motion of some Senator, I think the Senator from Colorado made it, did he not?

Mr. Shafroth: It was done upon my motion.

Mr. Thomas: The value can be ascertained just as easily in one case as in the other. The method of procedure is different; that is all.

Mr. Phelan: Do I understand, then, that there is no rule, and that the department is to ascertain the value of copper and gold and silver buried in the ground in order to determine the amount of income tax?

Mr. Thomas: Mr. President, if the Senator will permit me to answer him, the only difference is one of process. The assay determines the metalliferous contents of metallic ore, while, of course, coal is a commodity, all of which in the vein is a commercial product. It is, therefore, merely a difference in the method of ascertaining the value. The output of a copper mine or of a lead mine for 12 months yields certain metalliferous contents, and the value in the mine of these contents is thus easily ascertainable. I will say to the Senator from California that the principle is one which occurs very commonly in his State and mine as a result of trespasses by one mine owner upon the property of another, sometimes willful and sometimes unintentional. Where it is unintentional the damages are based upon the value of the ore in the mine; and that is ascertainable, as I say, by assaying the contents and ascertaining them by chemical analysis. It is a perfectly simple and perfectly easy method of procedure.

Mr. Chilton: In the case of mines, it is 'a reasonable allowance for depletion thereof'—that is, for the depletion of the mine—'not to exceed the market value in the mine of the product thereof which has been mined and sold during the year for which the return and computation are made.' Now, that is absolutely fair. No matter what it is, whether it is a coal mine or a copper mine or a silver mine. What we are trying to do is to ascertain the exact value of the depletion of the mine. What has been put upon the product in the way of labor or refining processes should not be estimated, but the value of what is taken out when in the mine; and that is perfectly fair, no matter what it may be, whether it is silver, gold, copper or coal.

Mr. Phelan: Would there be any income tax whatever if the whole deductions were made, the value of the whole product taken out of the mine for that year?

Mr. Chilton: Why, certainly, the profit on it. This refers to a deduction and it fixes that deduction at the value in the mine. We are determining how much the mine has been depleted, and to do that we want to know the value of the product in the mine, not after it has been refined.

Mr. Shafroth: Mr. President, I want to state to the Senator from California the situation as it existed at the time this provision was adopted.

The committee had made the rule applicable to coal mines, giving them the right to a reasonable allowance for depletion, not to exceed the market value in the mine of the production thereof, but had made a different rule as to metalliferous mines, namely, the rule of reasonable allowance, not to exceed 5 per cent of the gross value at the mine of the output of the year. Now, that is a very indefinite thing. It is only for one year—5 per cent for one year—whereas, if we are entitled to anything, we are entitled to the value in the mine of the ore taken out that year. When the attention of the caucus was called to it, they readily conceded that that part of it should apply to the entire provision, the reasonable value, the same as in coal mines. Consequently, we struck out the word 'coal' and made it 'mines,' so that it would be applicable to all mines, for it can be ascertained just as readily in the case of metalliferous mines as in the case of coal mines.

As to the oil provision, the Senator from West Virginia (Mr. Chilton) who knows a great deal about this subject, wrote the amendment himself, explained it, and it was adopted, and I think it is a good provision.

Mr. Chilton: Mr. President, I wish to say to the number of the committee having this matter in charge that as to clause (a) on page 36, which was passed over, the conclusion has been reached that it is all right as it is written. The Senator from California (Mr. Phelan) does not want to pursue the matter any further, and the amendment may be adopted without further amendment."

VI.

MINING OF NATURAL DEPOSITS IS A LIQUIDATING BUSINESS, CONSUMING CAPITAL, A "SELF-CONSUMING PLANT."

The business of mining ore as to the lessor with a royalty or by the lessee who has subleased on a royalty, is as to the ore purely a liquidating business, consisting of the gradual conversion of the minueral capital in the ground into money, upon which conversion, as to the mineral in the ground it can be determined whether there has been a gain or profit upon the transaction.

Those who were enacting the law, as we have seen under the proceedings in the Senate, had no doubt that the taking out of ore and the disposition of it was as to the market value of the ore in the ground a conversion of capital, and it was stated in so many words that the reasonable allowance for depletion not to exceed the market value in the mine of the product thereof which has been mined and sold during the year for which the return and computation are made, was intended, and was absolutely fair, because it separated the exact amount of the depletion of the mine, because it did not allow for anything that had been put upon the product of the mine in the way of labor or refining processes. It gave simply the value of what is taken out when it is in the mine with no labor put upon it nor other expenditure.

This proposition of consumption or conversion of capital seems self-evident in the case of any natural product or natural deposit from which extraction or a taking is begun while it is in its natural condition. It seemed self-evident to Congress.

If an authority is necessary for this proposition, it can be found in *Von Baumbach* v. *Sargent Land Co.* 243 U. S. 525, where the court said:

"True, the value of the mine is lessened from the

> partial exhaustion of the property, and, owing to its peculiar character, cannot be replaced. But in no accurate sense can such exhaustion of the body of the ore be deemed depreciation. It is equally true that there seems to be a hardship in taxing such receipts as income, without some deduction arising from the fact that the mining property is being continually reduced by the removal of the minerals. * * *"

The court refers to the income tax acts, and points out that

> "in the Income Tax Law of September 8, 1916 (1915-1916 Stat. 756, 769) a reasonable allowance is made in the cases of mines for depletion thereof 'not to exceed the market value in the mine of the product thereof which has been mined and sold during the year for which the return and computation are made.'"

There is no question that under this language the court recognizes that the thing that is being depleted is the ore body in the mine; the depletion consists of the taking away of a portion of the ore. That depletion in a particular year is measured by the market value when in the mine of the product of ore during the year. That market value is the measure of the depletion for that year. But that depletion is not necessarily all allowable, for depletion on that ore capital extracted cannot exceed its March 1, 1913 market value, because depletion is restoring to the owner, his capital value. There is also no question that this court has recognized that, to the extent of the extraction or taking of a natural product for a particular year, capital has been converted into money during that year.

In the case of *Doyle* v. *Mitchell Brothers Company*, 247 U. S. 179, the court was deciding a case involving a natural product as capital, where the Commissioner of Internal Revenue had allowed a deduction of the cost of the standing timber in 1903. He had refused to use the

fair market value of the natural product on December 31, 1908, the date of the act going into effect. The ideas of the court seem to have become more clarified upon the subject of one kind of natural product, because the attention of the court had been brought to the nature of any natural product being worked out, which in this case was standing timber. And now the court says (p. 183 of the opinion):

> "When we come to apply the act to gains acquired through an increase in the value of capital assets acquired before and converted into money after the taking effect of the act, questions of difficulty are encountered. The suggestion that the entire proceeds of the conversion should be still treated as the same capital, changed only in form and containing no element of income although including an increment of value, we reject at once as inconsistent with the general purpose of the act. Selling for profit is too familiar a business transaction to permit us to suppose that it was intended to be omitted from consideration in an act for taxing the doing of business in corporate form upon the basis of the income received 'from all sources.'"
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> "The formula that the entire receipts derived from a conversion of capital assets after deducting cost value must be treated as net income, so far as it is applied to a conversion of assets acquired before the act took effect, and so as to tax as income any increased value that accrued before that date, finds no support in either the letter or the spirit of the act, and brings the former into incongruity with the latter. If the gross receipts upon such a conversion are to be treated as gross income, what authority have we for deducting either the cost or the previous market value of the assets converted in order to arrive at net income? The deductions specifically authorized are only such as expenses of maintenance and operation of the business and property, rentals, uncompensated losses, depreciation, interest, and taxes. There is no express provision that even al-

lows the merchant to deduct the cost of the goods that he sells.

Yet it is plain, we think, that by the true intent and meaning of the act the entire proceeds of a mere conversion of capital assets were not to be treated as income. Whatever difficulty there may be about a precise and scientific definition of 'income,' it imports, as used here, something entirely distinct from principal or capital either as a subject of taxation or as a measure of the tax; conveying rather the idea of gain or increase arising from corporate activities. As was said in *Stratton's Independence* v. *Howbert,* 231 U. S. 399, 415, 58 L. ed. 285, 292, 34 Sup. Ct. Rep. 136: 'Income may be defined as the gain derived from capital, from labor, or from both combined.'

Understanding the term in this natural and obvious sense, it cannot be said that a conversion of capital assets invariably produces income. If sold at less than cost, it produces rather loss or outgo. Nevertheless, in many if not in most cases there results a gain that properly may be accounted as a part of the 'gross income' received 'from all sources'; and by applying to this the authorized deductions we arrive at 'net income.' In order to determine whether there has been gain or loss, and the amount of the gain, if any, we must withdraw from the gross proceeds an amount sufficient to restore the capital value that existed at the commencement of the period under consideration.''

It was held, therefore, that as to depletion of a natural product or natural deposit, the market value of the date of going into effect of the act or as fixed by the act, was the basis of ascertaining gain on a disposition of capital; it is now fixed law that the general date for income tax laws, March 1, 1913, is the date at which the basic market value for ascertaining gain or loss is to be determined.

The court in the Von Baumbach case, *supra,* and also in this case of *Doyle* v. *Mitchell Bros. Company, supra,* made an effort to discriminate between a natural product growing on the top of the ground except as to the roots

of the timber, and a natural product below the surface of the ground, but that distinction is not at all convincing. It certainly was not convincing to Congress because the act under which this case is being argued applying to the year 1917 said in so many words that a depletion should be allowed for the market value in the mine of the product that is converted during the year of return, and the statute applying in 1918 to the return for that year wipes out the distinction theretofore made between natural products by putting standing timber, ore in the mine, and other natural deposits upon precisely the same level.

It seems, then, that it is settled by the decisions of this court that in the case of iron ore mined and sold during the year, there is a conversion of capital to the extent of the market value of the product in the mine of the ore extracted and disposed of during the years as of March 1, 1913, under the terms of one of these mining leases.

VII.

CONSTRUCTION GIVEN TO STATUTE MUST BE ONE THAT WILL ALLOW CAPITAL TO BE RETURNED.

An income tax statute which takes any part of the capital as income is unconstitutional.

Eisner v. *Macomber*, 252 U. S. 189, 205; 64 L. Ed. 521, 528.

The ore severed in mining is "something of exchangeable value severed from the capital" and its market value in its natural condition on March 1, 1913, compared with its market value at the time of extraction, represents what is severed from capital in the terms of exchangeable value, and it is at that date of extraction not only severed from capital but exchanged into money, as we shall next show under subdivision VIII of this brief.

This court in the last cited case shows that exchangeable value must necessarily be based on market value, if market value is ascertainable.

VIII.

CONSTRUCTION OF THE STATUTE IN FORCE IN 1917 AS APPLIED TO THE TRANSACTION, INCOME FROM WHICH WAS SOUGHT TO BE TAXED.

In order to apply the statute to the transaction of extracting ore under a lease, it is necessary, first, to ascertain what the transaction amounts to in point of gain, profit or income, when royalties are paid by lessee to lessor for ore taken out of a mine under the terms of these mining leases, keeping in mind that the acts tax income alone in the transaction.

This situation is no longer an open question under the decisions of this court, as we shall show. But to enter upon the question properly, it is necessary to point out that there is a settled rule applicable to these leases which is of fundamental importance. Such a lease as is here in question gives no title to the lessee in the ore bodies at the time of the making of the lease, nor so long as the ore remains in the ground unextracted. *Lynch* v. *Alworth-Stephens Co.* 267 U. S. 364, 369. Such a lease, however, confers upon the lessee a substantial right in property, which is certainly a property right. The lessee has no title to any of the ore until he reduces it to his ownership by extraction.

In this case last cited the court said:

> "The lessee takes from the property the ore mined, paying for the privilege so much per ton for each ton removed. He has this right or privilege under the form of the lease here involved so long as he sees fit to hold the same without exercising the privilege of cancellation therein contained."

The court in the case just cited refers to preceding cases to show that as long as the ore remains unextracted in the mine, there is nothing but a right giving no present title to the ore bodies, and cites *U. S.* v. *Biwabik Mining Co.* 247 U. S. 116, 125, 126; 62 L. Ed. 1017, 1021.

There is then at the making of the lease no sale of ore and no passing of title thereof, which could form the basis of a transaction disposing of capital, except as the beginning of a transaction unconsummated. But there must be, since the lessee converts and sells the ore as his own (and has the right to do so), a time when the ore extracted ceases to be the property of the lessor and becomes that of the lessee, and this time must be when it is severed from the soil of the mine, is reduced to exclusive possession as personalty by the lessee and is subject to sale by the lessee. Thereupon the ore ceases to be a part of the real estate and has become, of course, personal property. This point of time the statute seizes upon, and correctly does so, as the disposition of capital assets. This is proven by *Lynch* v. *Alworth-Stephens Co.* 267 U. S. 364, 369, where the phrase is used "market value in the mine of the product thereof *mined* or *sold* during the taxable year," and the statute uses the same words "value in the mine of the product thereof which has been mined and sold during the year." The sale is made during the year of extraction and upon extraction.

At that time there takes place "the sale or other disposition of property" under the statute, Sec. 2 (a) of the Act of September 8, 1916, quoted *supra,* and under the statute Sec. 202 (a) of the Act of 1918, quoted *supra,* which statutes, are, as to these words and this provision, identical in their terms. The capital asset disposed of is only the year's extraction, but none of the other ore

in the mine. Upon the then completion of this transaction of the year's extraction it is to be ascertained whether upon such disposition of property there has been a gain or profit or a loss. This is true as between lessor and lessee; and under *Lynch* v. *Alworth-Stephens Co., supra,* and under the statute, since it is at this time that the ore has been converted, it must be ascertained then and there what is the whole amount of depletion chargeable against the transaction as the cost value of the capital asset converted and disposed of, and that whole amount, according to *Lynch* v. *Alworth-Stephens Co., supra,* must be equitably divided between lessor and lessee under the law applicable in 1917 and by the express terms of the statute, under the law applicable in 1918. The statute of 1917, therefore, implied what the statute of 1918 expressed.

Up to the time of extraction of ore the right of the lessee to explore and take out ore and the reciprocal right of the lessor to receive royalties thereon have resulted in no realization of a gain or profit or loss and in no severance of any ore of exchangeable value as to the ore remaining in the mine. The provisions of the lease have remained purely executory as to ore in the mine and the transaction as to that ore has been *in fieri.* The property which is the subject of disposition is iron ore, and up to that time of severance and extraction it has remained the property of the lessor, but at the time of extraction, the ore extraced passes as personal property to the lessee. As to that ore actually extracted the lease is no longer executory but is executed. As to that ore extracted nothing remains to be done except to pay money.

The first provision of the statute that must be applied and given its effect, as to the transaction, is the general provision both for 1917 and 1918 in regard to the gen-

eral disposition or sale of property ("a sale or other disposition") of the statute, for the ascertainment of a gain or loss. The fair market value of March 1, 1913, of that ore disposed of, which is the subject of the transaction, must be compared with the market value of that same ore in the year of its extraction, such market value in both instances to be the market value of the ore as it stood in the mine, without any labor put upon it, it not being questioned that the lessor had acquired and owned the property on March 1, 1913, and the lease being then in existence. This sale shows "a gain, a profit, something of exchangeable value *proceeding from* the property, *severed from* the capital, however invested or employed, and *coming in, being derived,* that is, *received* or *drawn* by the recipient (the taxpayer) for his *separate* use, benefit and disposal, *that* is income derived from property. Nothing else answers the description." *Eisner* v. *Macomber,* 252 U. S. 189, 207.

The next provision of the statute that is to be applied is the special provision on the subject of depletion and the allowance therefor, and it is plain that these two sections of the statute must be reconciled and must be made congruous with each other. No authority upon statutory construction is needed to be cited here upon this general proposition of statutory construction beyond *Doyle* v. *Mitchell Brothers Co.,* 247 U. S. 179, quoted *supra,* as to avoiding an incongruity. The depletion section is reconciled and is reconcilable with the general statute for ascertaining gain. The depletion provision states that the depletion shall "not exceed the market value in the mine of the product thereof which has been mined and sold during the year for which the return and computation are made." This provision establishes first a legal standard of depletion, namely, the market value of the year's product of the mine; second, a limitation of

depletion, namely, that it shall not exceed the market value in that year of the ore extracted, third, that the ore extracted during that year is the capital asset sold. Now, since the general statute, under the Constitution, requires that nothing can be taken as income which is capital, it is apparent that these two sections taken together mean that the depletion shall not exceed the market value of the product of the mine in the mine during the year, but that allowance for depletion also shall not exceed the market value of that same ore in the mine on March 1, 1913. This is carried out in the proviso to the depletion provision, quoted *supra,* that when the allowances for depletion shall equal "in case of purchase made prior to March 1, 1913, the fair market value as of that date, no further allowance shall be made." On this method it is absolutely certain that allowances for depletion can never exceed the market value of the total ore in the mine on March 1, 1913.

But it may be said that if the market value upon disposition in the year of extraction does not equal the market value of March 1, 1913, the taxpayer has suffered a loss. If so, the statute has provided for losses both in business and not in business as deductions from gross income, and all the provisions are made to agree.

The problem of applying the law to the transaction, therefore, if there were no more to the transaction, would be the simple one of proving as a fact by competent evidence the market value at extraction of the tonnage extracted during the year of the return as the ore stood in the mine, and then proving the market value of that tonnage extracted as it stood in the mine, untouched and with no labor upon it, on March 1, 1913, which market value on March 1, 1913, cannot be exceeded in allowing for the depletion of the ore bodies during the year of the

extraction but must be allowed in order to restore capital.

To state the proposition in another way, this market value of such extracted tonnage in the year of extraction cannot be exceeded because the ore as a capital asset cannot be worth more than that market value, and depletion for that year's extracted ore cannot exceed the worth of that ore, when extracted. But the market value of that year's extracted ore cannot exceed the market value as of March 1, 1913, for under the statute all the increment of market value on that extracted ore over March 1, 1913 is gain or profit on capital and is under the statute all that can be allowed for depletion. No matter how much the market value of tonnage during the year of the extraction may exceed the market value of March 1, 1913, the depletion cannot exceed the market value on March 1, 1913; and depletion under no circumstances can be anything more than what the statute has determined to be the cost of that tonnage, namely, the market value of that particular ore in the mine on March 1, 1913 and must be that unless the payment of royalty contains within itself some other profit on capital, such as interest.

Yet the whole transaction in regard to the ore between the lessor and lessee has not yet been stated. Another consideration enters into the ascertainment of gain or loss and depletion.

IX.

LIMIT OF LESSOR'S INTEREST.

There is here a situation of rights created as of March 1, 1913. The right given to the lessee to extract is a valuable property right. The lessor has retained his ore,

it is true, but subject to the right given to another to extract it upon payment of twenty-five cents per ton on extraction and conversion. The leases were all made before March 1, 1913, when the statutes applicable to income tax took effect, and on March 1, 1913, the utmost of the market value of that ore in the mine, if afterwards extracted under the lease, is twenty-five cents per ton to the lessor. All market value exceeding the twenty-five cents per ton has upon extraction been granted to the lessee, and the total capital of the lessor in the ore is twenty-five cents per ton. All capital value in the ore actually extracted, when extracted, beyond twenty-five cents per ton on March 1, 1913, belongs to the lessee, the lease being then in existence.

Hence the lessee has the right to a part of that market value on March 1, 1913, if the market value on March 1, 1913, of those tons of ore exceeded twenty-five cents per ton. This diminished value of the lessor in the market value of the ore on March 1, 1913, which is imposed by the lease, does not affect the total depletion. It simply shows that the lessor's part of the depletion cannot exceed twenty-five cents per ton, because that is the utmost of his capital asset in the market value of the ore, if it shall be extracted under the lease. What may be the depletion of the lessee in these years we are not concerned with settling here. If the proof is that the market value of the tonnage extracted was at least equal to twenty-five cents per ton, and the market value in the year of extraction of that tonnage extracted was at least eual to twenty-five cents per ton, the lessor is no further interested because those comparative market values give him his utmost return of capital, and he is taking no part of the lessee's interest in the March 1, 1913 market value.

This equitable division of the total depletion is implied in the statute applicable to the year 1917 as decided by *Lynch* v. *Alworth-Stephens Co.* 267 U. S. 364, and is expressly provided for in the statute applicable to 1918, which provides: "In the case of leases the deductions allowed by this paragraph shall be equitably apportioned between lessor and lessee." The statute thus recognizes the rulings of the courts.

This court has ruled in *Lynch* v. *Alwort-Stephens Co.* 267 U. S. 364, that the total depletion must be based upon the fair market value of the ore in the mine extracted and sold during the year of the return, not exceeding the fair market value of the same ore on March 1, 1913. The opinion is careful to quote the general provision as to return of capital as controlling. If, then, the fair market value of ore extracted should be seventy-five cents per ton on March 1, 1913, and seventy-five cents per ton in the year of extraction, and the limit of the lessor's value in the market value of the tonnage is twenty-five cents per ton, the rest of the market value depletion is the property of the lessee unless he has in turn leased, in which event how much of it the lessee owned would be determined by the royalty to be paid by the sublessee, as to whom the lessee is lessor.

X.

THE DEFERRED ROYALTY PAYMENTS FROM MARCH 1, 1913, CONTAIN INTEREST AS AN EARNING ON CAPITAL.

There is yet another circumstance which has not been adverted to that affects the transaction so far as income tax is concerned. The general provision of the income tax statutes requires every gain on capital and every gain or profit on every capital transaction where capital

has been sold or disposed of or made use of to be accounted for by the taxpayer. Among the gains is interest on capital. These leases for the purpose of the income tax are considered as going into effect on March 1, 1913. If in the year following March 1, 1913, all the ore had been converted, the depletion of lessor would have been easy of computation under these proofs in the case. But the leases made it possible for the lessee to defer the payment of twenty-five cents per ton extracted by deferring the year of extraction, and thus by deferring the perfecting of his present obligation, to pay money when he did extract ore. But under the law a lease of ore is not a conditional sale of the ore. The present agreement to take twenty-five cents per ton for that ore, if extracted, simply amounted to saying that the lessee might defer the payments of moneys to become due under these leases *without interest,* until the time comes at which the lessee extracts the ore. Hence, if the lessee does defer and pays no interest, during deferment, that twenty-five cents per ton, if he does pay it, he pays both for the ore and for the deferment. When any extraction has been made there results under the law and under the terms of the lease a promise to pay money for that particular extraction, which the statute divides into years, and which promise inchoate when made, became absolute when extraction of ore was made; that is to say, an actual finished transaction, only as to the ore extracted. The leases could have been drawn with the provision that when ore was paid for, it should be paid for at twenty-five cents per ton with interest thereon during the period of deferment. In such case the interest would have been clearly an earning or gain on capital when the interest was paid. But the promise was not so conditioned. Moneys to become due upon extraction drew no interest. The payments were and would necessarily be payments

based on ore actually extracted and sold, whatever the amounts of yearly or quarterly extraction should be.

There is a principle of law which applies here, well settled under income tax laws, that a deferred payment drawing no interest, contains within itself, when paid, two elements, a payment of a principal sum and a payment of interest on that principal sum, the gain of interest during the period of deferment.

Foley v. *Fletcher,* 3 H. and N. 769.
Secretary of State v. *Scoble* [1903] A. C. 299; [1903] 1 K. B. 491.
Tiernan v. *Hinman,* 16 Ill. 400.

Hence, when the lessees paid the lessors for ore extracted in 1917, if the lessees were otherwise entitled as depletion to the market value of twenty-five cents per ton on March 1, 1913, the lessees were actually receiving in the payments of 1917 and 1918 a principal sum paid for capital and interest on that sum for the period from March 1, 1913, to the date of actual payment. The principal and interest are very easily ascertained by dividing the sum paid in 1917 into its one part of a certain sum of principal and its other part of interest on that sum from March 1, 1913, to the date of payment. The total of principal and interest exactly equals the payment made, which has been deferred. The interest in it is a clear earning of interest on a capital asset. The rate in the calculation here is five per centum.

The lessor in this case cannot claim his whole twenty-five cents on this transaction as depletion, because the moneys he has actually received contain an amount of gain or earning on a capital asset, and that gain can be treated in one of two ways, the whole twenty-five cents may be allowed as depletion, on each ton extracted, or the interest may be deducted from the depletion, other-

wise allowable. The result is precisely the same in amount of tax. The interest, the gain on deferment, should be added to gross income, if it is not deducted from depletion. But it is better that this element of interest should be deducted from depletion because the spirit of the statute is to ascertain what amount should be allowed as depletion for the actual decrease of capital, not reimbursed, as it has been decided.

Doyle v. *Mitchell Bros. Co.*, quoted *supra*, where it is said: "It may be observed that it is a mere question of methods, not affecting the result, whether the amount necessary to be withdrawn in order to preserve capital intact should be deducted from gross receipts in the process of ascertaining gross income or should be deducted from gross income in the form of a depreciated account in the process of determining net income. In either case the object is to distinguish capital previously existing from income taxable under the act." The result in amount of tax is precisely the same. In the payment of the royalty the utmost allowance for decrease of capital is the market value of the ore less earning on the principal or capital involved in that ore.

There results automatically from this method that the depletion allowed can never exceed, and in fact must fall far short of either the market value of the ore on March 1, 1913, or the market value of the ore at the date of extraction. In the end the actual ore extracted for successive years in market value would equal to the lessor his portion of the market value of March 1, 1913, but the depletion allowed in total could never reach that market value because each payment would have a deduction for interest taken from the depletion. Thus the provision of the statute is fulfilled that total depletion for both lessor and lessee can never exceed market value of the

ore on March 1, 1913. Every applicable section of the statutes has been given full effect and they are plainly reconcilable. The exact nature of the transaction as it is fixed by the decisions has not been deviated from, and absolute justice, if such an ideal exists, has been attained.

XI.

MARKET VALUE OF ORE AS A STANDARD.

Up to this point it has been assumed that the words "market value" have a well-known and particular significance in the law. Perhaps this significance in the income tax statutes should be now more fully explained. It may be unnecessary, but the explanation may be excused as a statement made *ex abundanti cautela,* because in this case the Government counsel in the trial court denied the legal meaning of "market value."

In the income tax statute for 1917 and for 1918 quoted above, the general words expressing and defining the standard to be used for the allowance to be made for depletion are: "the market value in the mine of the product thereof which has been mined and sold during the year for which the return and computation are made." The statute in force for 1918 placed the allowance for depletion upon original cost, provided that in the case of properties acquired prior to March 1, 1913, the fair market value of the property or the taxpayer's interest therein on that date shall be taken in lieu of cost up to that date. The same words "market value" as of March 1, 1913, for property owned on March 1, 1913, are used in the statute for ascertaining the gain or profit upon capital or property after March 1, 1913, disposed of or converted. It will thus be seen that the particular

provision of the statute for 1917 on depletion is made by the statute for 1918, simply a particular case under the general provision as to gain or loss upon a conversion of capital assets.

The words "market value" have a well-known and fixed significance in the law. They import a fact to be testified to by witnesses whom the law recognizes as cognizant of the fact; they import that the fact shall be proved by those who have experience as to the particular property in the particular market, knowledge of the standard to be applied in the particular market, and knowledge of the object to be valued. The witness, after his qualifications and knowledge are shown, testifies to the market value as a fact. If he says that he knows the market value, he is then asked what it is. This is so stated in *Montana R. Co.* v. *Warren,* 137 U. S. 348, 354.

In this case it is said:

> "After a witness has testified that he knows the property and its value, he may be called upon to state such value. The means and extent of his information, and therefore the worth of his opinion, may be developed at length on his cross-examination. And it is fully open to the adverse party, if not satisfied with the values thus given, to call witnesses in the extent of whose knowledge and the weight of whose opinions it has confidence."

1 Wigmore on Evidence, pp. 809-819, Secs. 711-721, has a statement on the subject of the authorities and of the rule.

The statutes, therefore, have established, first, that the depletion consists of ore extracted in a particular year; second, that the standard in the matter of ascertaining gains and profits and depletion consists of a particular kind of evidence, namely, market value of ore in the ground, and no other standard is allowed or suggested to be used or substituted.

XII.

APPLICATION OF THE LAW BY THE LOWER COURT TO THE PROOFS IN THIS CASE.

All the facts required to be shown in evidence under the preceding statement of the law were presented in the record to the District Court as shown by the statement of the case *supra*. The only item in dispute was depletion. The allowances made by the Government for depletion were shown, and the payments by the plaintiff of her assessments on those allowances made by the Government were shown by her checks cashed and returned. The quarterly payments to plaintiff of royalties were shown, and the tonnage extracted in each year was shown with the total quarterly payments therefor to this taxpayer for her one-sixth.

Then three witnesses were called, Mr. Savage, an iron ore mining operator living in the district and acquainted with the ore; Keith, an expert geologist and statistician, thoroughly acquainted with the district; a third, Ives, an iron ore buyer of the district; who each testified that he knew the character of the ore in these mines as merchantable iron ore; that that ore had a market value, that he knew the market value of that ore by the ton in the mine, untouched and unextracted, on March 1, 1913, and during the period from March 1, 1913, to 1917 and 1918, and during the years 1917 and 1918, and at and during those times at that place that market value was at least twenty-five cents per ton, and that this was regardless of who owned the ore or what lease was upon it. No question was made that this evidence was impeachable or capable of contradiction and no attempt to detract from it was attempted on cross-examination.

Then by calculations the amount of the tax payable was arrived at, by calculating depletion at twenty-five cents per ton on the actual extraction subtracting therefrom the interest in the payments when they were made, as deferred from March 1, 1913. The calculation of interest in the payments was shown, and there was no question made as to the figures. Then the proof was made as to the overpayment and those figures were not in dispute on the preceding method of ascertaining depletion.

XIII.

INSUFFICIENT ASSIGNMENTS OF ERROR.

Both plaintiff and defendant then asked for an instructed verdict without more, which action submitted the case to the court for decision. The court rendered a general finding and the sole question is whether there is any evidence to support the verdict.

Beutell v. *Magone*, 157 U. S. 154.
Empire State Cattle Co. v. *Atchison, etc., R. Co.* 210 U. S. 1, 8.

We may state in passing that none of the assignments of error seems to touch the question decided by the lower court on the evidence. The sixth assignment of error does not assert that there is no evidence to support the verdict. It does not even assert that the lower court did not base its decision upon evidence. It does not point out any statute wrongfully construed. No one can tell what is meant (R. 154) by the words "the fair market value as of March 1, 1913, of the plaintiff's interest in said mine," unless it be the fair market value of the plaintiff's one-sixth of the ore in the mine. But that is precisely the rule followed by the court. What plaintiff de-

sires to contend for, apparently, is that the calculation should have been an attempt to ascertain, in an arbitrary way by arbitrary assumptions, the assumed selling value of the lease on March 1, 1913. These assumptions have no connection with the standard of the law. The statutes say and this Court has decided that the standard to be used is the market value of the ore in the mine. In the discussion, since the court has allowed a certiorari, we pass the point of no proper assignment of error but do not waive it.

XIV.

THE RULE AS TO DEPLETION TO BE FOLLOWED HAS BEEN SETTLED BY THIS COURT.

In *Lynch* v. *Alworth-Stephens Co.* 267 U. S. 364, the question arose under the law applicable in 1917. The Alworth-Stephens Company was lessee in iron ore mining leases made prior to March 1, 1913, reserving a royalty of twenty-five cents per ton. The Alworth-Stephens Company had subleased, prior to March 1, 1913, its rights at a royalty of seventy-five cents per ton for one tract and of sixty cents per ton for the other tract. As to the sublessee the Alworth-Stephens Company was lessor and the case is, therefore, an authority on both lessor and lessee. From March 1, 1913, during the entire time, the market value of the ore in the mines exceeded seventy-five cents per ton (pp. 366, 367 of the opinion).

The Government contended "that the leases do not convey to the lessee the ore bodies, but are contracts of rental conferring only the right to use and occupy the premises and mine the ore, which, so long as it remains in the ground, is the property of the fee owner. It was therefore insisted that by the extraction of the ore, only

the property of the fee owner is depleted and such owner alone is entitled to allowance therefor."

It will be noted that the contention of the Government then was directly contrary to what it is now, since now they contend for a sale of all the ore in the ground as of March 1, 1913, disregarding the decisions.

This court held, however, that while it was true that the leases conveyed no title to the unextracted ore deposit, it was also true that the fee owner (first lessor) and the first lessee, Alworth-Stephens Company, had each a property right under the leases. Then the statute of 1917 on depletion was quoted, and it was said (p. 370) that "as the process of extraction goes on" the property interest of both lessor and lessee is depleted.

> "There is an exhaustion of property in the one case as in the other; and the extent of it, with the consequent deduction to be made, in each, is to be arrived at in the same way; namely, by determining the aggregate amount of the depletion of the mines in which the several interests inhere, based upon the market value of the product, allocating that amount in proportion to the interest of each, severally considered."

Here we wish to emphasize the phrase "based upon the market value of the product" as the rule for depletion.

The principle of this division (p. 369) is that

> "by the terms of the statute each is entitled to deduct from gross income a reasonable allowance for depletion, the lessee for exhaustion of the leasehold interest and the lessor for the exhaustion of the fee interest as lessened by the interest of the lessee, such deduction to be allowed according to the value of the interest of each in the property, the entire allowance, however, not to exceed the total market value in the mine of the product thereof mined and sold during the taxable year."

Thus it is plainly decided that the depletion is of the ore extracted, that the standard of depletion is the market value of the ore extracted, that the fee-owner gets of that depletion his market value in the ore as diminished by the lessee's interest, that the lessee gets the rest of the market value, that the total depletion must be determined for division between lessor and lessee and must not exceed the market value in the mine of the product thereof mined and sold during the taxable year and out of the total depletion there must be allocated to each of the lessor and lessee his depletion in proportion to his interest severally considered.

The court, while careful to quote the statute, does not advert to the consideration that by the general provision as to the disposition of property resulting a gain the depletion of capital cannot exceed the market value of the ore as capital on March 1, 1913. The point was immaterial, for in that case the market value was seventy-five cents per ton on March 1, 1913, and at all times thereafter, and the question could not arise of exceeding the market value of the ore on March 1, 1913. The same situation exists in this case now before the court.

The Alworth-Stephens Company as lessee was held entitled to deduct depletion under the above rule stated in the opinion at 71.9 per cent of its gross receipts for its royalties as sublessor. Its royalties from its lessee it must receive as a lessor as to the sublessee, before the sublessee gets any depletion. The same rule necessarily applies between original lessor and first lessee which became sublessor. The original lessor was by the same rule held entitled to depletion on its interest in the ore, but no question seems to have been made as to how the figures were arrived at or as to the amount of the lessor's depletion. Certainly the lessor's depletion would have

been taken care of in the other 28.1 per cent of the total royalties of seventy-five cents and sixty cents per ton not allowed as depletion to the lessee. It goes without saying that the lessor's depletion must be taken care of under the rule before any depletion can be granted to the lessee, since the opinion states that the lessor gets depletion for his interest as lessened by the lessee's interest.

In the case the Government's counsel allowed to escape the interest in the deferred payments as income, but proceeding on a conspicuously wrong theory of the law, it never seems to have occurred to them.

If, now, the rule stated in the opinion as to the respective depletions of the lessor and lessee is applied to the Government's contention in this case, the rule of calculating depletion contended for by the Department is manifestly impossible to be applied. The lessee in the instant case, under the Government's contention, cannot get any depletion. The lessor has an interest of twenty-five cents per ton. The depletion allowed is only 8.8. cents per ton, and this is the total depletion. All that depletion must be assigned to the lessor under the rule of the Department, leaving nothing for the lessee, which is a patent injustice.

Yet if it be taken as the fact in this case that in 1917 the ore extracted had a market value of seventy-five cents per ton and only twenty-five cents of that market value could be apportioned to the lessor, the lessee had, of the market value lessened by the lessor's interest, a capital interest of fifty cents per ton, which theretofore inchoate, became actual as to ore extracted in that year of 1917; and this must be so because on March 1, 1913, the market price per ton was seventy-five cents, twenty-five cents of which capital was appropriated

to the lessor's interest, and fifty cents of which was appropriated to the lessee's interest, but in both cases only upon extraction. Now the *Alworth-Stephens Company* case says that the whole depletion must be ascertained "by determining the aggregate amount of the depletion of the mines in which the several interests inhere, based upon the market value of the product, and allocating that amount in proportion to the interest of each, severally considered." The Department in the instant case pays no attention to this ruling, but insists on its method which contradicts statutes and decisions. *Lynch* v. *Alworth-Stephens Co., ubi supra,* shows that the promise became absolute upon extraction and the passing of title in the ore extracted, but only as to the ore extracted.

The only way in which the Department can avoid the manifest absurdity into which its method of ascertaining a depletion unit reduces its whole calculation of a depletion unit is to say, we will make one calculation to ascertain the problematic value of the lessor's lease, and we will take the original lessee's sublease and treat that as a separate matter as another lease and by our arbitrary rules assuming so many years of equal yearly extraction, calculate the depletion unit for the first lessee, become sublessor, on the basis of his reserved royalty of seventy-five cents per ton. But here a difficulty will be encountered, for the royalty paid by that first lessee to the original lessor is an expense to the lessee. He is entitled to deduct it as an expense. It is plain why the statute construed in *Lynch* v. *Alworth Stephens Co., supra,* lays it down that the total depletion must be ascertained for all the interests. If the Department says that it will take the margin of the lessee's reserved royalty over the lessor's reserved royalty, the result is no better, for the statute contemplates but one depletion

calculated on the market value of the ore in the year of extraction, not exceeding the market value on March 1, 1913, and a division on equitable terms of that whole depletion between lessor and lessee, and this court has so decided.

When the case comes to the depletion of the sublessee, another calculation under the arbitrary rules of the Department Engineers must be made. So that in the end the simple method stated by the statute is resolved into an arbitrary calculation as a separate thing for the lessor, another like arbitrary calculation for the lessee (sublessor), another like arbitrary calculation for the sublessee. The ore, in which title is passing only upon extraction, is divided into three separate estates or interests, arising and made perfect as an actual ownership, one at the making of the lease, another at the making of the sublease, each with a separate depletion unit, and the lessor under no circumstances can get his capital back, while at the same time large depletions are allowed to the lessee and sublessee. On this method the lessor's depletion unit would be 8.8 cents per ton, the lessee's say 17.6 cents per ton, and the sublessee's, say 5 cents per ton, 31.4 cents per ton in all, and the lessor, who is first entitled to depletion, gets at 8.8 cents per ton only about a quarter of the total depletion, when in fact he was entitled to 25 cents per ton, less interest in the royalty payments.

It would seem, then, that the lower court followed the proper rule as adjudicated by this court. The proof was so made that the amount of only the lessor's depletion was shown, and not the amount of the lessee's depletion, but no part of the lessee's depletion was taken. If, now, on the Government's contention, the total depletion is to be assigned to the lessor and that depletion is only 8.8 cents, when the lessee comes to ask for his depletion he

will be met by the suggestion that this court has so adjudicated this question that the lessee can get no depletion. Thus the well considered case of *Lynch* v. *Alworth-Stephens Co., supra,* would be wholly nullified.

Under the law of 1918, depletion of mines, oil and gas wells, other natural deposits and timber, are all put on the same basis, and the question is settled by the statute. The statute requires the total depletion in the case of leases to be ascertained and equitably apportioned between the lessor and lessee, and this court has told us what this equitable apportionment must be under the law of 1917 as well as of 1918.

There is an opinion of this court which states the rule as to timber and necessarily states the rule under the statute for mines. There is no difference between the two things, both iron ore and growing timber are capital, stored up by nature, except that one is below the surface and the other above. The case now to be noticed has under the statute of 1917 and of 1918 become an authority on iron ore extracted.

In *Doyle* v. *Mitchell Bros.* 247 U. S. 179, 62 L. Ed. 1054, this court had before it a case involving the gain or income from cutting standing timber. The timber company deducted as an allowance from gross income from cutting and selling timber, the market value as of December 31, 1908 (the date for going into effect of the provisions of the then applicable statute) of the timber as uncut stumpage, the natural product standing on the ground in its natural condition. This market value was proven to be on March 1, 1913, $40 per acre. There is no more trouble in proving the value of uncut timber by the acre at a particular time and place than in proving the value of a ton of ore of homogeneous character, standing untouched, at or under the surface of the ground

as to which the statute says impliedly: "If you have not in your mine, the prophesied ore, you will never be required to consider it capital."

The case of *Doyle* v. *Mitchell Bros., supra,* was treated as a case of conversion of capital assets, just as the statutes of 1917 and 1918 treat ore in the ground and other natural deposits. The court said:

> "When we come to apply the act to gains acquired through an increase in the value of capital assets acquired before and converted into money after the taking effect of the act, questions of difficulty are encountered. The suggestion that the entire proceeds of the conversion should be still treated as the same capital, changed only in form and containing no element of income although including an increment of value, we reject at once as inconsistent with the general purpose of the act. Selling for profit is too familiar a business transaction to permit us to suppose that it was intended to be omitted from consideration in an act for taxing the doing of business in corporate form upon the basis of the income received 'from all sources.' "

The Department in that case presented a formula, so called, and of it the court said:

> "The formula that the entire receipts derived from a conversion of capital assets after deducting cost value must be treated as net income, so far as it is applied to a conversion of assets acquired before the act took effect, and so as to tax as income any increased value that accrued before that date, finds no support in either the letter or the spirit of the act, and brings the former into incongruity with the latter. If the gross receipts upon such a conversion are to be treated as gross income, what authority have we for deducting either the cost or the previous market value of the assets converted in order to arrive at net income? The deductions specifically authorized are only such as expenses of maintenance and operation of the business and property, rentals, uncompensated losses, depreciation, interest, and taxes. There is no express provision that even al-

lows the merchant to deduct the cost of the goods that he sells."

Then the court, later in the opinion, further said:

"The plaintiff, in making up its income tax returns for the years 1909, 1910, 1911, and 1912, deducted from its gross receipts the admittedly accurate valuation as of December 31, 1908, of the stumpage cut and converted during the year covered by the tax. There having been no change in market values during these years, the deduction did but restore to the capital in money that which had been withdrawn in stumpage cut, leaving the aggregate of capital neither increased nor decreased, and leaving the residue of the gross receipts to represent the gain realized by the conversion, so far as that gain arose while the act was in effect. This was in accordance with the true intent and meaning of the act."

This case shows that depletion consists of capital withdrawn in the shape of stumpage cut, measured by its market value, and the case holds, therefore, as an authority, that on a conversion of capital assets consisting of a natural product or deposit, when the question is of an income tax, the gain on the transaction, which gain is alone income, is to be ascertained by comparing the market value of the natural product as property in its natural state at the time for ascertaining value fixed in the act, with the market value of the same property at the year of the conversion of the natural product and the disposition thereof, and that the market value of the product in its natural condition must be deducted before there can be any gain or profit for the purposes of an income tax law. This is said to be entirely reconcilable with the proposition of earlier cases that if it is an excise tax of corporations and not an income tax that is in question, as was the case with mines prior to March 1, 1913, there need be no allowance for depletion in the fixing of the excise tax as to income from ore, nor does

the word "depreciation" cover depletion of capital assets, for the purpose of fixing the excise tax; and that such allowance is not required by the word "depreciation" since depreciation does not cover depletion. This was pointed out in *Lynch* v. *Alworth-Stephens Co.* 267 U. S. 364, 371; 69 L. Ed. 660, 663, where the court said:

> "We are referred to *Weiss* v. *Mohawk Min. Co.* 264 Fed. 502, where the circuit court of appeals for the sixth circuit reached an exactly opposite conclusion to that announced in the present case by the courts below. The opinion in that case was apparently made to rest upon the decision of this court in *United States* v. *Biwabik Min. Co. supra,* which, in turn, followed *Von Baumbach* v. *Sargent Land Co.* 242 U. S. 503, 61 L. Ed. 460, 37 Sup. Ct. Rep. 201. These cases, however, arose under the Corporation Tax Law of August 5, 1909, chap. 6, 36 Stat. at L. 11, 112, Sec. 38, 4 Fed. Stat. Anno. 2d ed. p. 255, imposing a special excise tax with respect to the carrying on or doing business by a corporation, etc., measured by its net income, in the ascertainment of which, among other things, there was authorized a deduction of 'a reasonable allowance for depreciation of property.' The *Sargent Land Co. Case* concerned the owner and lessor of mining property, while the *Biwabik Min. Co. Case* concerned a lessee of mining property. It was held in both cases, as we hold here, that the leases under consideration did not convey title to the ore in place. Whether the lessees had property interests such as we have determined here was not considered. Both decisions, expressly in one and implicitly in the other, turned, primarily, upon the scope of the word 'depreciation.' In the *Sargent Land Co. Case* this appears expressly from the following extract (pp. 524, 525): 'We do not think Congress intended to cover the necessary depreciation of a mine by exhaustion of the ores in determining the income to be assessed under the statute by including such exhaustion within the allowance made for depreciation. It would be a strained use of the term "depreciation" to say that, where ore is taken from a mine in the operation of the property, depreciation, as generally understood

in business circles, follows. True, the value of the mine is lessened from the partial exhaustion of the property, and, owing to its peculiar character, cannot be replaced. But in no accurate sense can such exhaustion of the body of the ore be deemed depreciation. It is equally true that there seems to be a hardship in taxing such receipts as income, without some deduction, arising from the fact that the mining property is being continually reduced by the removal of the minerals. But such consideration will not justify this court in attributing to depreciation a sense which we do not believe Congress intended to give to it in the Act of 1909.' And this view is immediately emphasized by putting in contrast with the 'depreciation' of the 1909 Act, the 'reasonable allowance for the exhaustion * * * of property' of the income-tax provision of the Tariff Act of October 3, 1913 (38 Stat. at L. 166, chap. 16, 4 Fed. Stat. Anno. 2d ed. p. 236), and the exhaustion and depletion provisions of the Act of 1916, heretofore quoted. 'These provisions,' the court concluded (p. 525), 'were not in the Act of 1909, and as we have said, we think that Congress in that act, used the term "depreciation" in its ordinary and usual significance. We therefore reach the conclusion that no allowance can be made of the character contended for as an item of depreciation.' "

It must be plain that the court in the case of *Lynch* v. *Altworth-Stephens Co., supra,* would not allow the *Sargent case,* distinguished therein, to be pressed beyond its plain application to an excise tax. Therefore it is settled that by the very terms of the laws for 1917 and 1918, where they establish the rule for the gain or income from sale or other disposition of property, the market value of March 1, 1913, must be compared with the market value of the date of such disposition by conversion. Unless the market value of the date fixed by the act is first withdrawn from income upon such conversion, there is a tax of capital as well as income, which is not constitutional.

The interpretation put by this court on the statute in *Lynch* v. *Alworth-Stephens Co., supra,* is the only interpretation that will reconcile all the provisions of the statute and give them all a proper effect, and that interpretation is reconcilable with the principle of other decisions of this court to the effect that if the taxable income from receipts for assets sold in any year includes any part of the market value of March 1, 1913, the law has taken capital as income and would be unconstitutional.

Eisner v. *Macomber,* 252 U. S. 189.

Doyle v. *Mitchell Bros. Co.* 247 U. S. 179.

XV.

THE CONTENTION OF THE GOVERNMENT AS SHOWN BY THE RECORD UPON THE LAW AND AS TO THE TRANSACTION OF THE PAYMENT OF ROYALTIES UNDER A LEASE MADE BEFORE MARCH 1, 1913, IS INADMISSIBLE.

So far as the record shows, the Government on the trial defined its position without making any suggestion as to the proper method to be followed until it made a motion for a new trial, which is not a reviewable proceeding.

When the plaintiff offered in evidence the computation of depletion by the Department in its letter upon which the tax was assessed and paid, the objection was made: "First, that the method used by the revenue agent has no tendency to show the method used by the commissioner, and, second, that the method used by the commissioner is entirely immaterial in this case" (R. 29). Later, counsel for the Government said: "Now if the purpose of these exhibits is to show that the commissioner make a mistake in applying his own method, then I am objecting" (R. 31).

The defendant's counsel upon the motion to instruct the jury (R. 17) stated as grounds for the motion that there was no legally sufficient evidence to show that fair market value as of March 1, 1913, of the plaintiff's interest in each of the mines, nor to show the estimated tonnage remaining in the mines at the end of the years 1916 to 1919, inclusive, respectively; that the method of plaintiff does not result in a reasonable allowance for depletion; that it is not in compliance with the commissioner's regulations, and that "the undisputed evidence shows that the allowances computed by the plaintiff are not a percentage of his capital invested equal to the percentage of the whole mineral content withdrawn during the year, and are not a percentage of his capital investment equal to the percentage of the unpaid royalties paid during the year for which the calculation is made."

This language it is difficult to understand. What the remaining estimated tonnage at the end of any year has to do with the question is not stated. The proposition that the allowances computed are not a percentage of the March 1, 1913 capital investment shown by market values equal to the percentage of the whole mineral content withdrawn during the year is untrue as a matter of fact. Assume the whole mineral content anything you please. The market value is twenty-five cents per ton to lessor. The amount withdrawn is valued at twenty-five cents per ton. The allowances computed are at twenty-five cents per ton less interest. The proportion is the same, since the multiplier is the same. The further proposition that allowances for depletion are not a percentage of capital investment that is the percentage of the unpaid royalties paid during the year to capital investment is also untrue. "Capital investment" are the words in which lurk the fallacy. The statute says "market value of March 1, 1913," is capital investment.

Counsel means capital investment to be something else. If for capital value you insert "market value of March 1, 1913," his proposition is precisely fulfilled by the lower court. The assumption of counsel is that that title to the estimated ore has by virtue of the lease passed to the lessee and this is proven by page 8 of petitioner's brief, where it is claimed: "The taxpayer's only interest in the properties on March 1, 1913, was that of lessor" and on page 12: "her rights were merely to receive the royalties stipulated in the leases and to obtain possession of the property on the termination of the leases."

The sixth assignment of error (R. 154) states probably what is the Government's contention. It is as follows:

> "6. Said District Court erred in refusing to hold as a matter of law that a reasonable allowance to the plaintiff in this cause for the depletion of the respective mines should be computed by dividing the estimated ore reserve tonnage on March 1, 1913, of each mine into the fair market value as of March 1, 1913 of the plaintiff's interest in said mine, and multiplying the dividends so obtained by the total tons of ore extracted from each mine, respectively, on which royalties were paid to the plaintiff during the taxable year for which the depletion allowance is claimed, provided that the aggregate of the allowances for the year 1917 does not exceed the fair market value in the mine of the ore which was mined and sold during that year, and provided further that the aggregate of the allowances made for previous years plus the amount of the allowance made for the year in question does not exceed the fair market value as of March 1, 1913, of the plaintiff's interest in the mine."

There is an error here in the word "dividends." Tonnage, the divisor, is being divided into market value, which is the dividend, the thing to be divided, and the word the Government's counsel intended to use is probably "quotients," the results of the divisions. It may be

noted in passing that this assignment is not equivalent to asserting that there was no evidence to support the judgment, which is the one assignment that could be made on this record.

The key to this cabalistic statement of counsel is what the counsel meant by "fair market value of March 1, 1913, of the plaintiffs' interest in the mine." This he does not explain. If he means what the statute said as to market value, he means market value of the ore in the ground and the interest of the taxpayer therein, which is here one-sixth of twenty-five cents in each ton, whatever the amount was in the ground. The method followed by the lower court exactly fulfills the condition stated in this sixth assignment of error, for the result would be twenty-five cents as the result of the division of tonnage into market value, and twenty-five cents applied to the tonnage extracted gives depletion of twenty-five cents per ton. But this cannot be what is intended by counsel, for he means to reject market value as a fact and by a calculation to show what he calls market value. His alleged market value attained by calculation is not the market value of the statute.

The department objected on the trial to the method of proving market value by competent evidence as to market value (R. 23). The Government contends that market value must be shown in another way. That way is indicated by the Commissioner's calculation (R. 128), said to be made by the Valuation Engineers of the Department but adopted by the Commissioner through his assistant. Counsel has totally overlooked the fact that his method requires another calculation for the market value of the lessee's interest.

The Valuation Engineers took the estimated tonnage on March 1, 1913, which is 188,382,892 tons, and the tax-

payer's interest of that is one-sixth, or 31,397,149.7 tons, belonging to the taxpayer on March 1, 1913. They recognize that her interest is in tons one-sixth of the tonnage, which is one-sixth of each ton.

Then they average the yearly extraction for all of the owners during the years 1913 to 1918, both inclusive, at 4,700,000 tons. How the taxpayer making up her return early in 1918 could possibly know the extraction in 1918, the Valuation Engineers wisely do not attempt to tell us, for that knowledge required for the taxpayer either waiting until a penalty has been incurred or prophetic omniscience. The Valuation Engineers divide that so ascertained average yearly extraction into the total estimated ore reserve, and forty is somewhere near the result. And they say that forty years is the maximum life of the mines. This is not fact, it is arbitrary assumption. But one of these leases runs for a term of twenty-five years, so that the assumption is contrary to the fact, and the unexpired portions of other leases differed and no unexpired term could reach forty years.

Then the Valuation Engineers took the total tonnage reserve on March 1, 1913, of the taxpayer, 31,397,149.7 tons, and multiplied it by twenty-five cents, the royalty reserved, and they said in those assumed forty years the total tonnage extracted will be absolutely and necessarily the whole reserve, which at twenty-five cents a ton for the taxpayer's one-sixth, will be $7,849,287.18. This is called "the capital sum returnable in forty years." (R. 128.) Is it not plain that the assumption is that the lessee has bought once for all the whole ore reserve in the land? Next they said that the present worth of this $7,849,287.18 returnable in forty years to this taxpayer is on March 1, 1913, $2,782,551.64, which amount they claim is the market value of all the ore in the ground on

March 1, 1913, under the terms of the statute. This figure they got by the Hoskold table, as the brief of petitioner on page 37 admits, for four per cent sinking funds with six per cent returns on capital to the taxpayer, opposite the number of forty for the year. The figure in the table is .354491 and if you multiply $7,849,287.18 by this .354491 you get $2,782,551.64 which they call present worth. Then they divided the total tonnage reserve of the taxpayer which is assumed to be as they stated (R. 128), 31,397,148.7 tons, into so-called market value present worth of March 1, 1913, calculated to be $2,782,551.64, and the result is the figure .088 with continuing fraction. This .088 is, they say, 8.8 cents, the unit cost per ton, March 1, 1913, to the taxpayer, the basis for depletion. Then they took the number of tons extracted for the taxpayer in the particular year and multiplied that by that unit of depletion so ascertained, 8.8 cents, and the result, they said, is the depletion in that year. Thus a depletion of 8. 8. cents per ton is equal to a market value per ton exceeding twenty-five cents. This result is not a fact; it is a fairy tale.

The point here is how they get at the "present worth" of the taxpayer's one-sixth of the ore as the figure which they have stated. The explanation is found (R. 141) in the following words: "The value of the total royalties to be received during life of mines discounted as of March 1, 1913, at 6% and 4% interest gives a unit value as of March 1, 1913, of .088 a ton." This calculation of discounting, the figures show and it is admitted, is the well-known method called Hoskold's Formula, which we shall now examine.

This formula is an adaptation of the old annuity formula reversed. It can be applied only where certain facts exist or where certain arbitrary assumptions are

made to fill the void of facts. The formula requires, first, moneys to be received in equal yearly amounts for a fixed number of successive years. These equal amounts to be received in each of the successive years must amount to a certain total sum which is known and fixed beforehand, here total prophesied royalties. Hence, to suit this formula the Government is compelled to assume, first, a fixed number of years for the extraction of ore, which they have assumed at forty years, no more and no less, and they call that forty years the life of the mines. Second, they must assume that extraction in each year will be just one-fortieth of the total ore reserve, no more and no less. They must assume that the estimated ore reserve is absolute and will all certainly be extracted in exactly equal yearly amounts for forty years. They must assume also that title in the entire ore body has passed by the lease to the lessee, that the lessee has the ore; all that remains to the lessor is a chose in action agreeing to pay money. They treat the transaction as a present sale at the time of the lease of all the ore and they strive to ascertain the present value of that entire sale.

So under the formula they take for each assumed year one-fortieth of the total royalties which they prophesy will be paid to the taxpayer over the whole assumed forty years in forty equal installments. They must assume this to make Hoskold's table apply. One-fortieth of this assumed total amount of royalties will be each annual payment to this taxpayer of royalties, which becomes approximately, by dividing $7,849,287.18 by forty, the sum of $196,232. Then, according to the formula, each one of the annual payments of $196,232 is divided into two parts when paid; one part is six per centum upon the present worth to be ascertained, the other part is the remainder of the annual payment. Now this remainder of

each annual payment is assumed to go into a sinking fund, and for each yearly payment that remainder of the annual payment is assumed to draw interest, and interest is calculated for the number of years it is to stay in the sinking fund at four per cent compounded yearly until the forty years have elapsed. Thus under this scheme at the end of the first year of royalties paid after March 1, 1913, the calculation is applied to a fixed amount paid in the year, $196,232. Six per cent on the present worth to be ascertained is, by virtue of the formula, to go to the taxpayer as a dividend. So if X be this present worth to be ascertained, .06X is six per cent on it, and the yearly payment of $196,232 minus .06X is the part of the remainder of that annual payment which will go into the sinking fund, and interest at four per cent, compounded annually, is calculated upon that amount of $196,232 minus .06X for thirty-nine years, and in the next year the annual payment being the same and the dividend to the taxpayer being the same, the calculation on the same sinking fund amount is for thirty-eight years, and so on down to the last year. Then all these various payments into sinking fund with all the interest calculated on each of them are added together, and that is said to be the present worth of the taxpayer's interest in the ore. This is what is meant by setting up a reserve. According to the Government the amount of 196,232 — .06X should be set up in the beginning for each year as a reserve by lessor. Interest and principal resulting from these calculations in forty years would be the present worth of the mine. The calculation works cut at $2,782,551.64. Thereupon they take the present worth so calculated at $2,782,551.64 and divide it by the taxpayers' total tonnage on March 1, 1913, of 31,397,148.7 tons, and the result they get is .088 with a continuing fraction, which is this mysterious unit of depletion. But the folly of it is that if you should take one hundred

years as the Hoskold figure to multiply by, your present worth would be practically *nil*. The depletion unit depends solely on the imagination of the figurer, the prophetic soul of a valuation engineer dreaming on things to come.

It is plain that this is a reversal of the annuity formula where a fixed amount is paid each year for the life expectancy number of years, and a calculation is made to find what amount must presently be paid for that annuity so that at the end of the time the payer of the annuity will have paid a fixed amount per year to the annuitant, and will have enough money out at interest, with interest on it to the end of the life expectancy period, to make the payer of the annuity whole.

These figures of the Valuation Engineers in this case can be proven in this way: Take the whole amount assumed to be paid of $7,849,287.18 to the taxpayer during the assumed forty years. It will necessarily be made up of the assumed forty equal payments of $196,232. It will also equal forty times six per cent on $2,782,551.64 assumed to be paid to the taxpayer as interest on his capital each year in forty different installments assumed to be paid one in each year, plus the remainder of each yearly payment of $196,232 in each year, with interest thereon at four per cent from the year of payment to the end of the forty-year period, respectively, for each year. This last calculation on installments of sinking fund and interest thereon will equal $2,782,551.64. Hoskold's formula with its tables will give the figure for any number of years less than fifty, on a dollar. That figure becomes a multiplier of $7,849,287.18, being the total of all royalty payments if the estimated prophesied tonnage is all extracted, no more and less, if the extractions are equal over forty years, no more and no less, when these requisite fixed assumptions are made.

The question is, what connection has this method of calculating depletion with the statute and with the rule as laid down by this Court? It depends upon assumptions which are notoriously contrary to facts in the record. The assumed total tonnage is something no man can actually know. The basic assumption of equal annual extractions in a fixed amount is contrary to the fact in this case and contrary to all human experience in mining iron ore. In 1917 there were extracted for all the owners' lessors, 6,256,098 tons. In 1918 the extraction was 5,278,570 tons. Of each of these extractions the taxpayer had one-sixth (R. 21). On the assumptions of the formula, one-fortieth of 188,392,892 tons, or 4,709,572 tons, were and must be extracted in each year, and the taxpayer's assumed one-sixth thereof was much less than the actual extraction. But let any reasonable man try to assume such an uneconomical lessee as one who would go at ore extraction in such a wasteful way. The fact is that the depletion unit is calculated on an untrue basis and then applied to an actual extraction. But this depletion unit has nothing to do with the actual market value per ton of the statute.

The radical injustice of such a proceeding is shown by the fact that the unit of depletion is made to depend not on any market value per ton, but on the length of term specified in the lease. One taxpayer gets one depletion and another taxpayer gets another depletion per ton on the very same quality of ore per ton, extracted in the same year at the same place. This is all pointed out by the Circuit Court of Appeals in its opinion (R. 163), although by inadvertence the years are stated in the opinion as 1916 and 1917 instead of 1917 and 1918. If the same sort of calculation is applied to each lease separately, the life of the mine is fixed as the unexpired portion of the lease, so many equal annual extractions are figured to each year of the unexpired term, sinking fund deposits

are calculated in the same way, but the result is that the same taxpayer for the same kind of ore gets under one lease a certain depletion unit per ton and under another lease, another unit.

This was in fact the revised calculation of the Commissioner in this case. Petitioner's brief, p. 38 already referred to shows that the valuation engineers saw the manifest absurdity of calculating on the basis of royalty returns during a number of years long after the leases by their terms would cease to exist. So they treated each lease and depletion thereunder as a separate matter. The brief quotes the agreed statement of facts in the case of McHale v. Hull, which case was decided in 16 Fed. (2d) 781. Mr. Hull was a brother of the respondent here and he was also the owner of a one-sixth interest in these lands and he was suing to recover overpaid assessments for 1917 and 1918. The case was never brought up to this court, and the Government paid the judgment. The petitioner's brief (p. 38) shows that the new calculation was by taking each lease by itself, the unexpired term of a lease was under Hoskold's formula, the years for annual equal extractions. The results were tabulated in an agreed statement of facts which the Government refused to make in this case. Over results of that tabulation the Government counsel draw a charitable veil of silence. The results are as follows:

Lease	Royalty	Estimated Net Receipts of Taxpayer	Life of Mine	Valuation Factor at 6% and 4%	Taxpayers Unit of Depletion	Depl Allo
1	.25	$5,646,798.45	37 years	.374130	.090726	$77,1
2	.25	3,127.40	4 years	.846052	.205128	....
3	.25	197,519.57	39 years	.360832	.087501	1,6
4	.25	386,045.29	30 years	.428283	.105860	2,5
5	.25	48,865.08	34 years	.395772	.095973	1
6	.25	805,757.87	20 years	.534292	.129564	13,1
7	.25	293,556.48	40 years	.354491	.085965	1,4
8	.25	89,555.05	16 years	.590625	.143226	1,1
						$99,1

In the above table the taxpayers unit of depletion is shown for each ton in her one-sixth of the tonnage. In the table as it is given the unit was one-sixth of the amount given above being the taxpayers unit on the whole tonnage extracted.

The inherent and fundamental fault as to law in the Valuation Engineers' calculation adopted by the Commissioner is that they assume a proposition of law contrary to the decisions of this court. It is assumed that the transaction at the time of making the leases, fixed at March 1, 1913, was a sale of all the tonnage in the mine at a figure of twenty-five cents per ton by the lessor to the lessee, but that is not the fact, and the assumption boldly negatives the authoritative decisions. But even then, since the ore is to be paid for in the future without interest, one yearly payment contains less interest than a later yearly payment. Next, the method tries to find, not the element of market value of the ore, but rather what the Commissioner would consider the present value on March 1, 1913, of the lessor's reserved right to receive royalties if extraction takes place uniformly over a fixed period of time, or where extractions in equal yearly quantities in successive years all take place over a hard and fast fixed period of years and the lease continues until the end of the term and all the estimated ore is extracted. The method must assume that the lessee obtained under his leases every ton of ore by full title and sale and an executory contract is thus converted into an executed conveyance. But in this case the extraction never under the leases could extend over the period assumed as the unvarying life of the leases, because, as the opinion of the Circuit Court of Appeals points out (R. 161), the leases would expire before that forty years had elapsed on the first calculation or on the second calculation. And the long leases in *Lynch* v. *Alworth-*

Stephens Co., supra, show the fragility of such an assumption. There the ore was worked out in seven years.

No conversion of the ore resulting in a disposition of it as ore ever takes place until, under the leases, ore is extracted, and then only to the amount of the extraction. Hoskold's formula was never intended to suit such a proposition. The formula was originally devised to furnish some basis for which to guess at the amount to pay outright for a fully exploited mine being sold solely on the basis of the exploited ore. The formula took the estimated tonnage in the mine, which is one conjecture. It said that the buyer can take out that ore and no more or less, and he will take out that conjectured ore in equal yearly amounts. This ore will result in so much money per ton when mined, treated and sold. The formula says, to get at the matter roughly, we can assume equal extractions until the ore is exhausted in so many years. The buyer can afford to pay such a sum as will net him six or more per cent on his investment and also give him enough money each year to put into a sinking fund to reimburse the amount which he is going to pay for the mine. Thus when the ore runs out, the purchaser will have back what he paid and will have made on it in the meantime during his operation of the mine six per cent interest as dividends. The whole proposition is based on a present purchase of the ore where the owner parts with his whole interest and where the owner dictates the extraction. The formula never was intended to be used for a case of lessor of a mine, and if a case of a bargain and sale of an iron mine or of a lease of it, based on such a calculation had ever been made by an owner, he must have been an imbecile. The regulations of the department have now condemned this method. Art. 206, Regulations 69, Art. 226, Regulations 74, says:

"Valuations by analytic appraisal methods, such

as the present value method, are not entitled to great weight. * * * Where the fair market value must be ascertained as of a certain date, analytic appraisal methods will not be used if the fair market value can reasonably be determined by any other method."

The Board of Tax Appeals rejected Hoskold's formula in *Owens Bottle Co.* v. *Commissioner,* 8 B. T. A. 1197, 1217. This was a case of depletion of a license agreement under a patent where the Commissioner used Hoskold's formula at 15 per cent for remuneration and four per cent for sinking fund. The depletion by Hoskold's formula was found to be too low and was rejected by the Board. It will be noted that this was a case of no market value where value was required to be reached by some method of analysis other than proof of market value. In a very late case, *U. S.* v. *Garbutt* (C. C. A. 10th Circuit) the Hoskold Present Value Table as a basis for ascertaining market value is pointedly condemned and the regulation condemning it is quoted. We can refer for the case only to United States Daily, November 21, 1929, page 10.

The theory of the Government's counsel is made plain by the question asked by the Government's counsel of defendant's only witness. The question was (R. 37) "In the mining industry, what method is customarily used for depletion, depletion reserves, capital expenditures such as stripping charges, for amortization of bond issues?" This was objected to as wholly irrelevant and immaterial. The court sustained the objection. The Government's counsel observed: "This is a return of the capital account, your Honor, it doesn't make any difference whether it is amortization of bond issues or return of invested capital, that is it." The witness answered: "I say the capital is returned at the same rate as the material is taken out of the ground and in step with that

extraction." Counsel for plaintiff said: "Why, of course, they couldn't pay off anything unless they took something out of the ground; is that what he means?" The Court: "I understand so." Other questions were then asked which submitted to the witness the decision of the case involving the construction of the law and the meaning of its terms and the meaning of the decisions upon it (R. 38). The Government's counsel (R. 39) stated: "I would like to offer to prove by this witness that the custom in the mining industry in regard to setting up depletion reserve and providing for depletion, both in respect to lessor's interest in mines and operating owners and lessees in mines, is to set aside year by year a proportionate part of the March 1, 1913, value of the interest, which proportion is properly—which is the same proportion as is the proportion of the physical body extracted to the total estimated content in a mineral body." But this offer refutes the Hoskold formula of prophecy. According to the effect of the offer, when ore is extracted a reserve is set up out of the receipts of that ore extracted and not in advance of extraction by pure surmise on unwarranted assumptions. The setting up of a reserve based on actual extraction, counsel ought to have seen, refutes the theory of the calculation of the officials. But the whole proposition seems to be one of ignorance. The present Head of the Government says that there is no such practice. H. C. Hoover, Principles of Mining, p. 44.

> "In the practical conduct of mines or mining companies sinking funds for amortization of capital are never established. In the vast majority of mines of the class under discussion, the ultimate duration of life is unknown, and therefore there is no basis upon which to formulate such a definite financial policy, even if it were desired."

The difficulty with the whole conception of the Government is that it is founded on an incorrect legal theory

backed by arbitrary assumptions as to the future which cannot possibly be justified, and which are opposed to the plain common sense of the law and the actual transaction. Yet the engineers had a glimmering of the light, in that they were trying in an illegal way to take care of the interest in deferred payments.

After the Commissioner had arbitrarily put all the leases in under a classification of forty years for the maximum life of each of the leases, a recalculation was made on the basis of each separate lease, giving to each lease its own separate ore reserve assumed to be in the ground leased, assuming as the life of the mine the unexpired portion of the term, and treating each lease as a separate proposition with the same arbitrary assumptions of a fixed annual extraction over a fixed number of years assumed as the life of the mine. The result is shown in the table *supra*. The principle of calculation remains precisely the same. It resulted in a slight reduction in the tax by allowing a varying depletion unit, for the ore extracted under the lease with twenty-five years to run from 1903, of which ten years had expired, leaving sixteen years for the lease to run, showed, of course, a very great depletion unit per ton, because the total of sinking fund payments is total depletion in all the years, and to take care of a sum to pay out twenty-five cents for each ton in sixteen years takes much larger annual sinking fund payments than to pay out the same sum in forty years. That final calculation relied on was not produced but the method is stated in the brief of petitioner, Appendix C, page 38, and it was the method, and we have produced the actual results of the calculations in the table, *supra*. That unit varies from eight cents a ton through nine cents, ten cents, twelve cents, fourteen cents, twenty cents up to twenty-four cents per ton. What becomes of the simple rule of uniformity

prescribed by the statutes? Where under this rule is there any chance to give the lessee his depletion? And what has become of the legal proposition that no title to ore passes except the title to ore actually extracted. The Hoskold method is wrong, because it shows a different unit of depletion for each lease at the same time and place of extraction of the same quality of ore, and necessarily different units for different taxpayers with the same royalty reserved. This result contradicts the statute which puts all taxpayers on the same basis. That fact absolutely refutes the propriety of the calculations of the Valuation Engineers, to say nothing of their violation of the statute.

There is involved in the Government's contention another misconception. In the statute for 1917 the words 'the taxpayer's interest therein" (meaning interest in the property disposed of) are not used, but those words are used in the statute for 1918. The plain commonsense meaning of the taxpayer's interest therein is to say that since ore is the capital asset being converted, the taxpayer's interest therein is the amount of his estate, whether the whole or a part therein. The interest spoken of is an estate in fee in the ore that is the subject of the transaction being accounted for and that ore is the ore extracted during the year or, if the taxpayer has only a life estate, that question must be settled with reference to remaindermen.

The Government says that these words, taxpayer's interest therein, negative the conception of the lease that the thing to be considered is the ore, but rather the taxpayer's interest means what is the calculable value of the lessor in the lease, treating the lease as a present conveyance of all the mines and attempting to arrive at this present value of the lease by conjecture, using the Hoskold formula. The Department does not follow *Lynch* v.

Alworth-Stephens Co., supra, and does not find the lessee's market value in the ore diminished by the lessor's value in the ore, all to be tested by the market value of the ore on March 1, 1913, and market value of the same ore when extracted and when it is ascertained that the ore is extracted and its quantity converted is ascertained, so that there is nothing to deal with but facts. The Government contends that in these leases is an absolute series of promises in each lease to pay a certain amount in each year over a number of years, one promise maturing each year during the whole term of the lease, and these promises are all to be figured by discounting to ascertain what is the present value of each promise, then the present values of each promise on these assumptions are to be added together, and their total shows the present value of the leasehold. This present value is then to be divided by the imagined total tons under the ground, and the result is a depletion of 8.8 cents per ton to be applied to the actually extracted tonnage. This is wholly independent of any market value of ore in the ground and never touches that standard. The theory gets nowhere because the total interest on all the promises is averaged among all the promises, the principle being to charge the taxpayer with interest now, because he expects to get it in the future; *i. e.,* it is a constructive receipt of interest, *tunc pro nunc.*

Suppose as was the case in *Lynch* v. *Alworth-Stephens Company, supra,* the whole body of ore is worked out in seven years, the lessor has been charged in advance with interest earned on the promises as if a large part of them had been outstanding for forty years or thirty, or twenty or ten, as the case may be, earning interest on capital. The scheme cannot work justly, to say nothing of its failure to connect with the law or the nature of the transaction.

The interest of the taxpayer in the leased ore is not an interest in forty promissory notes of equal amounts, one maturing each year after March 1, 1913, but is the fee in one-sixth of the ore, on which fee there is a lease of an undivided one-sixth of each ton of ore in the mine whatever that quantity may be, until extraction, and upon extraction the interest changes into money due as to the ore extracted but does not change as to the rest of the ore left in the ground. The money interest is a one-sixth interest in each ton extracted, measured by the twenty-five cents per ton royalty. This is the same as saying a twenty-five cents interest in one-sixth of the extracted tonnage. The absolute estate of the taxpayer in the ore not extracted has not been at all affected. It is unjust. The lease may be given up or forfeited the next day or the ore may run out in a few years, for economy dictates the taking out of the greatest quantity of ore in a particular place, not mining in different spots over the whole area.

But suppose that the case were one of forty promissory notes payable one each year for forty years. It is plain that in the payment made the first year there is less interest than the one made in the fortieth year. Yet these ingenious engineers lump all the interest together and average it by charging an equal amount of interest in each year. The same observation applies, if the leases are treated separately.

XVI.

THE GOVERNMENTAL REGULATIONS, SO FAR AS THEY ARE APPLICABLE, SUPPORT THE RULE FOR DEPLETION FOLLOWED IN THE LOWER COURT IN THIS CASE.

The regulations in use stated that under paragraphs 7 and 8 of Section 5 there were contemplated two classes

of deduction to take care of the wasting of assets, *i. e.*, (a) depreciation, (b) depletion. Depreciation comprehended loss on improvements other than natural deposits, while the loss of natural deposits was to be considered depletion. And then it was stated in Treasury Decision No. 2446, February 7, 1917, that:

> "In the case of mines • • • if the property was acquired prior to March 1, 1913, the amount of invested capital which may be extinguished through annual depletion deductions from gross income, will be the fair market value of the mine property as of March 1, 1913. The value contemplated herein as the basis for depletion deductions, authorized by this Title must not be based upon the assumed salable value of the output under current operative conditions less cost of production, for the reason that the value under such conditions would comprehend the earning capacity of the property." (This is not very well expressed, but earning capacity of the property means the work of brains and mental effort as well as wages and is the reason why market value of ore in the mine is mentioned in the statute.)

This regulation recognizes at least that mining consists in a liquidation of capital assets and the capital must be returned in depletion, but the only case to which the regulation can be applied is one where the owner of the mine is operating and extracting and selling the ore.

The next paragraph of Treasury Decision No. 2446 is as follows:

> "Neither must the value determined as of March 1, 1913, be speculative, but must be determined upon the basis of the salable value en bloc as of that date, of the entire deposit of minerals contained in the property owned, exclusive of the improvements and development work that is, the price at which the natural deposits of mineral property as an entirety in its then condition, could have been disposed of for cash or its equivalent."

We have quoted above the condemnation of the pres-

ent value method in the regulations, where market value can be arrived at.

This general ban on speculation would certainly forbid the assumptions and speculations necessary under Hoskold's formula. The regulation should have used "market value" instead of "salable value." In law they mean the same thing, but evidently to accountants, salable value means not the same thing as market value. The regulation would require an ascertainment of market value of the ore in the mine as of March 1, 1913. The accountants think the regulation means something other than market value of ore. They think it means averaged value of a series of promissory notes maturing one each year for successive years after the common date of all the notes. The regulation in a loose way conforms to the statute to that extent. It is evidently addressed to a distinction between the market value of the ore and the value of the mine improvements and development work.

These regulations, however, give no warrant to the calculations of the Department in paring down the depletion allowable to suit the Procrustean bed of Hoshold's formula. The Commissioner's epitaph on the present value ascertainment by the Hoskold formula is plain.

XVII.

ANSWER TO PETITIONER'S POINTS.

The first point stated in the brief of the petitioner is that the market value of the ore extracted in the years of accounting for income tax was not proven as of March 1, 1913. What is really meant by that statement is that such value was not proven by the Hoskold formula method.

In the brief of the petitioner the point insisted upon is that in some way the ore remaining in the mine after the year of extraction must be determined. The position is stated on page 8 of the brief of petitioner. "The allowance for depletion should be computed by determining the percentage of the whole reserve which was withdrawn and paid for during the taxable year and taking this same percentage of the value of the taxpayer's interest in the mine on March 1, 1913."

But this precisely what was done in the case. Market value is twenty-five cents per ton or more of all ore in the mine and all ore extracted. The percentage of extraction in tons is to the ore in the mine in tons, whatever it may be, just the same as the market value of the ore extracted is to the market value of the ore in the mine, whatever it may be. There is no need to solve the factually insoluble problem of how much ore there is left in the mine and the statute does not require it.

The next position is (page 19) that the "capital investment should be returned in step with the exhaustion of the physical property," and for this the case of *United States* v. *Ludey*, 274 U. S. 295, is cited. But that is just what the method of the lower court follows.

Next it is said on the same page that "it is necessary to obtain the value on March 1, 1913 of the taxpayer's expected royalties," and on page 8 it is said: "The taxpayer's only interest in the properties on March 1, 1913, was that of lessor, to receive the royalties stipulated in the lease." This position is contrary to all the cases and assumes that the fee owner under the lease has parted with all interest in the unextracted ore. It shows the underlying fallacy of the Hoskold formula method and has been fully answered hereinbefore.

But the fact is that as to ore actually extracted in

any year the allowance for depletion is the value on March 1, 1913, of the promise to pay therefor, for on the method of the lower court, there is taken out of the payment all interest earned on it as a deferred payment from March 1, 1913. It is said (p. 8) that this is what the statutes and regulations require. If so they have been exactly fulfilled. Nothing more than interest has been taken out. Certainly interest for a long term in the future has not been taken out, because it is a fact that payment has been made and the interest thereon has ceased to be paid. The transaction as to ore extracted has been closed and the interest in it is ascertainable as a fact.

Next on page 10 appears a quotation from the record where the witness was asked whether Mrs. Spalding's interest in a ton of ore was twenty-five cents. Of course it was not. It was one-sixth of twenty-five cents. The witness answered in a way that shows that he did not understand the question. He evidently supposed assumptions were necessary. The next witness answered what is evident but said that he was testifying to "the value of a ton of ore regardless of ownership." The next witness did not know what Mrs. Spalding's interest was.

The case of *United States* v. *Ludey*, 274 U. S. at page 302 (page 10 of brief), is misunderstood by counsel. The case there before the court was a case of profit on the sale of a mining property. When a mine is sold, if owned before March 1, 1913, its market value or its value, if it has no market value, at that date must in some way be ascertained. If there be no market value, this ascertainment requires estimating the ore in the mine and to that situation, the language of the court is addressed. The court did not have before it the propriety of any depletion charge, ex-

cept that it stated that from the March 1, 1913, value, the depletion since that date should be deducted from the value on March 1, 1913, as a part of the cost returned, in case of ascertainment of profit on a sale of the property after March 1, 1913, and the deduction should be not the depletion actually taken, but the depletion that ought legally to have been taken. Now in the case of a lease there is no present sale of ore or a mine, and no sale takes place until ore is actually extracted and converted. The Ludey case can have no bearing here, nor was it intended thereby to disapprove *Lynch* v. *Alworth Stephens Co., supra.*

On page 20 of petitioner's brief the testimony of the only witness for the defendant (R. 37-43), now petitioner, is referred to. He said that capital is returned at the same rate as the material is taken out of the ground and in step with that extraction. This seems obvious enough. Next the witness was asked his opinion on the whole law involved (R. 38). An objection was sustained. Next he was asked: "What is the customary method in the mining industry of determining depletion alone?" To this question an objection was sustained. Next the offer to prove was made and this offer was obviated by the witness answering the question as to the general custom in the mining business with reference to determining allowance for depletion (R. 40) and he answered: "We take the value of the mine as of the basic date, and the tonnage in the mine as of that date, we divide the value of the tonnage to get a factor to be used for depletion; then in any one year the number of tons extracted in that year times the factor gives us the amount of depletion." That was precisely what the respondent, then plaintiff, was contending for, and that was precisely what was done.

Then the witness, in answer to questions by the court, "You have to arrive at a figure which represents the tonnage and another figure that represents the value of the mine" answered in the affirmative, and that he did not intend to include in his answer any method as to arriving at the tonnage or as to the value. Then he said that without the value of the owner's interest as of the basic date and without an estimate of the ore reserve, a proper allowance for depletion cannot be determined in accordance with the custom.

Then he answered that certainly under that rule if there were two mines side by side taking out ore of the same quality at the same time the unit of depletion or figure per ton for depletion in one mine might differ very much from the figure or unit of depletion in the other mine by its side (R. 41). Then he answered other questions that showed that he was assuming a certain number of years to extract the ore and was varying the unit of depletion by reference to the amount of ore left in the mine. This was the same old Hoskold formula proposition. Then he finally testified:

> "Q. If the two mines are side by side, and the one takes out exactly the same quantity of ore as the other mine, and the ore is of the same quality, the one mine's depletion is the same as the other mine's depletion, isn't it?
>
> A. It certainly is not. It is the same in amount but not the same in rate. The same number of tons of ore have been taken out, but not the same proportion of the total ore."

The lower court could not possibly find upon this evidence for it did not show how tonnage could be arrived at until total extraction was made nor how market value could be arrived at. This witness was testifying altogether on legal opinions, calling an opinion a legal definition of market value, miscalled a custom.

The case of *New Creek Co.* v. *Lederer,* 295 Fed. 433, was decided on the proposition that the taxpayer could not claim all the market value as depletion, since the plaintiff was a lessor upon royalty reserved. The fact was that there was interest in the royalty payments when made and the court saw that the plaintiff's rule could not be correct.

Next the brief of petitioner at page 21 asserts that "this method disregards the extent of the mineral reserve and permits an allowance which may result in the return of the taxpayer's entire capital prior to the exhaustion of the mine." The method does not require any inquiry as to the extent of the mineral reserve which is not capable of accurate determination. It does not permit, as we have demonstrated heretofore in this brief, a return by depletion of the taxpayer's capital, much less more than that capital. The method does not give a greater capital to a ton of ore mined in one year over a ton of ore mined in a later year. What the method does say is the obvious legal proposition that a ton of ore paid for in 1917 carries less interest on the payment deferred four years from March 1, 1913, than does a ton of ore paid for in 1925 on the payment deferred twelve years from March 1, 1913.

Next it is stated in the brief (p. 21) that there were several mines involved and yet the common rate of depletion was applied to each. But the proof was that the ore was all of the same grade, fifty-four per centum iron and an exceptionally high grade (R. 22, 23). Therefore the unit of depletion per ton, where iron ore has a market value which is the same for all the mines, must be the same for all the mines.

The government here contends for the rule of varying depletion units for the same quality of ore with the same

market at the same time and place, and its contention is based upon a wrong method, and unsound legal propositions. The method has been repudiated by the Commissioner in the regulation which, quoted *supra*, says emphatically, "the present value method" "will not be used if the fair market value can reasonably be determined by any other method." The scheme of trying to amortize capital is said by a high authority, quoted *supra*, as one that is not used in mining. The Hoskold formula method has been thoroughly discredited, as it must be if the statutes are followed, if facts are to govern transactions, if common sense has any part in the income tax administration and if citizens are to stand with equal rights before the law.

Conclusion.

There is a saying of a wise Greek that every matter has two handles, one by which it can be taken hold of and one by which it cannot. It is apparent that the handle of a sale outright of all the ore in the ground under a mining lease at the time of the lease going into effect is a handle by which this problem cannot be grasped, while it is contrary to a series of decisions of this Court.

Congress in enacting the statutes here under consideration laid down an easy rule to follow. This Court has said in *Lynch* v. *Alworth-Stephens Co.*, *supra*, as to this statute:

> "The plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover."

Certainly, when the "curious, narrow, hidden sense" of a statute is one evolved by the ingenuity of expert ac-

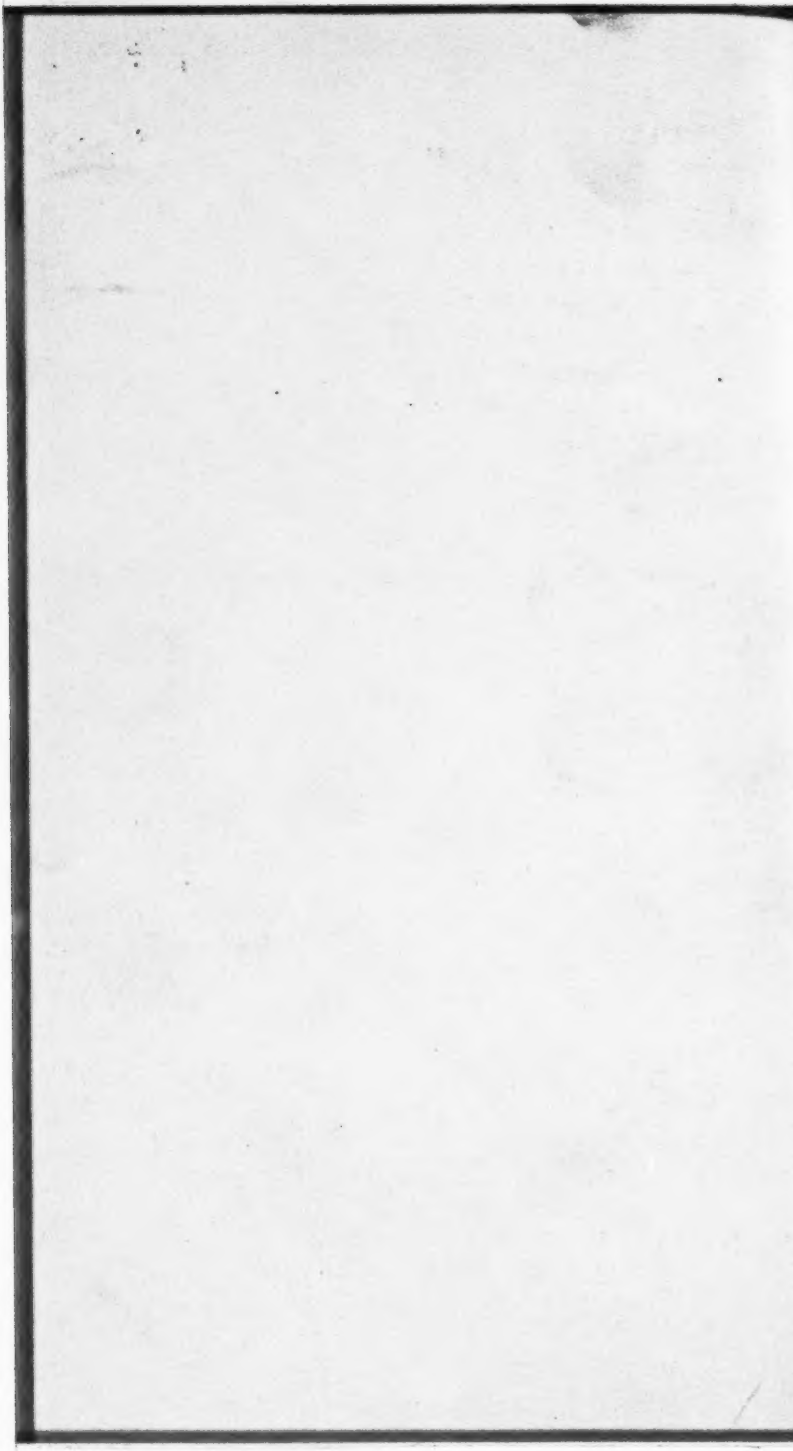
countants, who never take into consideration the meaning of legal terms, and who think the law must be wrenched from its legal meaning to fit an inapplicable formula, no court is justified in following them.

We pray the affirmance of the judgment of the Circuit Court of Appeals, with a direction that interest under the statute be allowed to the date of payment of the judgment.

John M. Zane

Henry P. Gardner

Counsel for Appellee.



SUPREME COURT OF THE UNITED STATES.

No. 59.—October Term, 1929.

Mabel G. Reinecke, Collector of Internal Revenue for the First District of Illinois, Petitioner,
vs.
Eudora Hull Spalding.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[January 6, 1930.]

Mr. Justice McReynolds delivered the opinion of the Court.

The respondent owns a one-sixth interest in several leases executed 1901, 1902, 1903, and 1905, which authorize the lessee to take iron ore from certain Minnesota lands for twenty-five, forty-five and fifty years from their respective dates. These leases require payments quarterly of 25 cents royalty per ton upon all ore extracted; provide for minimum annual production and termination under specified circumstances.

During the year 1917 she received out of such royalties $260,072.30; during 1918 $219,940.43. For 1917 she was allowed $99,561.20 as depletion; for 1918, $84,979.55. Income tax was assessed against her upon the balances and payment exacted. Thereafter she unsuccessfully claimed refunds because the sums allowed for depletion were insufficient. The present suit followed.

The Revenue Act of 1918, c. 18, 40 Stat. 1057, 1066, 1067, (approved February 24, 1919) provides—

> Sec. 214. (a) That in computing net income there shall be allowed as deductions:
>
> . . . . .
>
> (10) In the case of mines, oil and gas wells, other natural deposits, and timber, a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions in each case, based upon cost including cost of development not otherwise deducted: Provided, That in the case of such properties acquired prior to March 1, 1913 the fair market value of the property (or the taxpayer's interest

therein) on that date shall be taken in lieu of cost up to that date: Provided further, That in the case of mines, oil and gas wells, discovered by the taxpayer, on or after March 1, 1913, and not acquired as the result of purchase of a proven tract or lease, where the fair market value of the property is materially disproportionate to the cost, the depletion allowance shall be based upon the fair market value of the property at the date of the discovery, or within thirty days thereafter; such reasonable allowance in all the above cases to be made under rules and regulations to be prescribed by the Commissioner with the approval of the Secretary. In the case of leases the deductions allowed by this paragraph shall be equitably apportioned between the lessor and lessee.

Sec. 5, Revenue Act for 1916, c. 463, 39 Stat. 756, 759, is in the margin.* Neither party suggests that this differs from the corresponding provision in the Act of 1918, *supra*, in any way here material.

In her claim presented to the tax officer for refund of overpayment for 1917 respondent said—

"Tax as assessed is based upon income received from royalties from iron ore mines. Depletion amounting to $99,561.20 was allowed to taxpayer, whereas depletion amounting to

*Sec. 5. That in computing net income in the case of a citizen or resident of the United States—

(a) For the purpose of the tax there shall be allowed as deductions—

. . . . .

Eighth. (a) In the case of oil and gas wells a reasonable allowance for actual reduction in flow and production to be ascertained not by the flush flow, but by the settled production or regular flow; (b) in the case of mines a reasonable allowance for depletion thereof not to exceed the market value in the mine of the product thereof, which has been mined and sold during the year for which the return and computations are made, such reasonable allowance to be made in the case of both (a) and (b) under rules and regulations to be prescribed by the Secretary of the Treasury: Provided, That when the allowances authorized in (a) and (b) shall equal the capital originally invested, or in case of purchase made prior to March first, nineteen hundred and thirteen, the fair market value as of that date, no further allowance shall be made. No deduction shall be allowed for any amount paid out for new buildings, permanent improvements, or betterments, made to increase the value of any property or estate, and no deduction shall be made for any amount of expense of restoring property or making good the exhaustion thereof for which an allowance is or has been made.

$203,510.86 should be allowed. The latter amount is the present worth of the ore mined in 1917, as of March 1, 1913, and is arrived at by discounting the amount received in 1917 at 5% to March 1, 1913."

A like statement appears in her claim concerning over-payment for 1918.

The declaration has two counts. The first, relating to payments for 1917, alleges—

"That the value or market price of said ore in the ground untouched and unextracted on March 1, 1913, and on all dates subsequent thereto, exceeded the sum of twenty-five cents per ton, so that every ton of ore paid for under said leases in the year 1917 was disposed of at a price actually less than market prices of the ore, and if then sold free of said lease, would have realized more than twenty-five cents per ton. The actual depletion of the mines by each ton of ore extracted was more than twenty-five cents when extracted.

"That under the terms of the law the depletion for ore extracted or considered to be extracted was fixed at the market value of the ore in place in the mine at the time and place of extraction, but if such depletion allowance per ton exceeded the amount fixed as the royalty per ton in the lease, the depletion allowance to the plaintiff could not exceed such royalty, but since the royalty when paid included an amount of interest on the payment considered as deferred from March 1, 1913 to the date of actual payment of royalty and the allowance of such depletion in successive years could never exceed the market value of the ore in the mine on March 1, 1913.

"That each payment for ore extracted consisted of two parts, one of which was interest on the deferred payment and the other of which was the actual present worth of the payment deferred from March 1, 1913. Said actual present worth is accurately represented for each ton by that sum which put at interest on March 1, 1913, would produce at the date of payment for ore the royalty paid per ton; to put it in another way, the actual present worth of the ore extracted is accurately ascertained by taking from the royalty per ton paid, the part of the royalty, when and as paid, which represented interest on the deferred payment from March 1, 1913.

"That such an allowance of depletion in successive years and in the year 1917 did not and could not exceed the market value of such ore on March 1, 1913.

. . . . . .

"That if of each payment for each ton of ore extracted, the amount of such payment which represents interest on the payment as deferred and actually paid, be figured, the income of the owner will be accurately determined as that part of the twenty-five cents, which represents interest.

"That for the year 1917 a correct calculation under the rule above shows that upon the tons of ore extracted and paid for on January 14, 1917, of the payment of 25¢ per ton $0.2095 was for selling price or principal and $0.0405 was interest on the deferred payments and that on the 330,507 tons extracted the plaintiff was entitled to depletion of $69,-251.05; that upon the ore paid for on April 10, 1917, $0.2074 was for selling price or principal and $0.0426 was interest on the deferred payments and that on the 48,958 tons extracted the plaintiff was entitled to depletion of $10,153.29; that on the ore paid for on July 10, 1917, $0.2053 was for selling price or principal and $0.0447 was interest on the deferred payments and that on the 231,090 tons extracted plaintiff was entitled to depletion of $47,434.55; that upon the ore paid for on Ocober 10, 1917, $0.2032 was for selling price or principal and $0.468 was interest on the deferred payments and that on the 432,120 tons extracted the plaintiff was entitled to depletion of $87,791.42; that plaintiff is entitled to depletion amounting for the years 1917 to $214,630.31."

Count two contains similar allegations concerning the payment for 1918.

In the trial court, after requests by both sides for directed verdict, the respondent had judgment and this was affirmed by the Circuit Court of Appeals.

The latter court said—

"The sole controversy is over the correctness of the Government's method of arriving at the value of the iron ore in the ground on March 1, 1913, a matter not covered by the revenue acts in question, nor by any regulation of the Treasury Department."

This does not accurately state our understanding of the issue. It was necessary for the taxpayer to show the illegality of the exactions. "The burden of establishing that fact rested upon it, in order to show that it was entitled to the deduction which the Commissioner had disallowed, and that the additional tax was to that extent illegally assessed." *Botany Mills* v. *United States,* 278 U. S. 282, 289, 290; *United States* v. *Anderson,* 269 U. S. 422, 443. The real point is whether respondent established her claim for refund by adequate evidence. And we think she did not.

On March 1, 1913, she was the lessor of mines from which the lessee had the right to extract ore during many years, paying therefor when taken out 25 cents per ton. Her rights were merely to receive the royalties stipulated and to regain possession when the leases terminated. Manifestly, the fair market value of this interest in 1913 was much less than 25 cents per ton of the estimated contents of the mines, but respondent introduced no evidence which tended to show such value. The suggestion that market value per ton on March 1, 1913, was equivalent to the sum which if then put at simple interest would have amounted to 25 cents when the ore was actually taken out and the stipulated royalty became payable cannot be accepted. This method of estimation would decrease the 1913 market value with the passing of every year. Moreover it disregards the fact that respondent's interest was in the mines considered as entireties and not in particular parts of ore beds which the lessee had agreed to remove during designated future years.

Under the statute it became necessary for respondent to establish the fair market value of her interest in the mines on March 1, 1913, or at least that such value was not below what she claimed it was. Otherwise, she could not recover. She introduced three witnesses who testified as to ore values. No one of them gave an estimate of the value of her interest at that time. Replying to the question, "You do not mean to testify that Mrs. Spalding's interest in that ton of ore as of March 1, 1913, or at any other time, was worth 25 cents or any other sum", one of them said: "That question is based upon Mrs. Spalding's one-sixth ownership of a lease at 25 cents per ton. That question is an entirely different one from the one asked me by Mr. Zane. It would require a good deal

of calculation and certain assumptions as to how fast that ore would be shipped. Then it would require discounting against those assumptions to present value. That calculation would take time, and I can not answer that without working it out." The other two gave no estimate of such value.

The judgment of the court below must be reversed. The cause will be remanded to the District Court for further proceedings in conformity with this opinion.

Mr. Justice BUTLER took no part in the consideration or decision of this cause.

A new copy.

Test:

Clerk, Supreme Court, U. S.